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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-306

In re Applications of

Henry R. Malloy, Jr. d/b/a REM MALLOY BROADCASTING	File No. BPH-860627MH
PEEBLES BROADCASTING COMPANY	File No. BPH-860603ME
James S. Lee and Donald L. Baker d/b/a INTERACTIVE MEDIA	File No. BPH-860707MS
FREE AIR CORPORATION	File No. BPH-860707NH
BERNARD DAWSON	File No. BPH-860707NW
SPECIAL MARKETS MEDIA, INC.	File No. BPH-860703MH

For Construction Permit for a New FM Station on Channel 275A in Raleigh, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1994; Released: January 9, 1995

By the Commission:

1. By this action we dismiss on procedural grounds the requests for extraordinary relief filed by Rem Malloy and Free Air Corporation,[1] deny the motion to disqualify counsel filed by Free Air,[2] and dismiss as moot related motions to stay filed by Rem Malloy and by Free Air.[3] In dismissing the requests for extraordinary relief that ask us to reverse a Review Board's order remanding this case for further hearings, we find that neither Rem Malloy nor Free Air has demonstrated urgent and compelling circumstances warranting a waiver of the prohibition against interlocutory appeals under 47 C.F.R. § 1.115(e), and that the ongoing rulemaking proceeding that proposes to revise the criteria for selecting among fully qualified applicants is not a basis for reviewing the Board's interlocutory order at this time. Finally, for the reasons set forth herein, we find nothing improper about Lawrence Bernard continuing to serve as legal counsel for Bernard Dawson.

BACKGROUND

2. This case involves six applicants, three of which were disqualified by the presiding judge.[4] Of the three applicants found qualified, the ALJ preferred Bernard Dawson over Rem Malloy Broadcasting and Free Air based upon its comparative showing. Free Air, which did not propose any integration, ranked far behind Dawson. While exceptions were pending before the Review Board, the Commission imposed a freeze on comparative proceedings in response to *Bechtel v. Federal Communications Commission*, 10 F.3d 875 (D.C. Cir. 1993).[5] In a Memorandum Opinion and Order, released on September 12, 1994, the Review Board specified financial qualifications issues against Rem Malloy Broadcasting and against Free Air Corporation and remanded this case to the Presiding Judge for the preparation

[1] On September 19, 1994, Free Air filed an Emergency Petition for Extraordinary Relief and Rem Malloy filed an Emergency Motion for Extraordinary Relief. The following pleadings are also pending before the Commission: (a) Joint Consolidated Opposition filed on September 23, 1994, and Amended Certificate of Service filed on September 26, 1994, by Peebles Broadcasting Company, Interactive Media, and Bernard Dawson (hereafter Joint Opponents); (b) Reply, filed September 27, 1994, by Free Air; (c) Joint Motion to Strike Free Air's Reply, filed September 29, 1994, by Joint Opponents; (d) Opposition to Motion to Strike, filed September 30, 1994, by Free Air; (e) Reply, filed October 3, 1994, by Rem Malloy; and (f) Joint Motion to Strike Rem Malloy's Reply, filed October 7, 1994, by Joint Opponents. In view of action herein dismissing on procedural grounds the requests for extraordinary relief, the Motions to Strike are moot and will be dismissed. See ¶ ¶ 8-16, *infra*.

[2] In addition to Free Air's September 19, 1994 Motion to Disqualify Counsel, the following pleadings are also pending before the Commission: (a) an Opposition, filed September 23, 1994, by Bernard Dawson; (b) a Reply, filed September 28, 1994, by Free Air; (c) a Motion to Strike Reply, filed October 5, 1994, by Dawson; and (d) an Opposition to Motion to Strike, filed October 6, 1994, by Free Air.

[3] The Motions to Stay were filed on September 19, 1994 by Free Air and Rem Malloy, and a Joint Consolidated Opposition was filed September 23, 1994 by Joint Opponents. Both Rem Malloy and Free Air seek a stay pending action on their requests for extraordinary relief; their stay requests are moot in view of our action herein dismissing on procedural grounds the requests for extraordinary relief. See ¶ ¶ 8-16, *infra*. In addition to requesting a stay pending Commission action on its Emergency Petition for Extraordinary Relief, Free Air's Motion to Stay also seeks a stay pending Commission action on its motion to disqualify counsel. It contends that counsel's continued participation will result in the compilation of a tainted hearing record, which will require vacation of whatever decision is reached on the merits. In view of our conclusion that the motion to disqualify counsel has no merit, however, that portion of Free Air's stay request is likewise moot. See ¶ ¶ 17-21, *infra*.

[4] The ALJ's decisions are reported as *Initial Decision*, 4 FCC Rcd 8423 (ALJ 1989); *Supplemental Initial Decision*, 6 FCC Rcd 2247 (ALJ 1991); *Further Supplemental Initial Decision*, 7 FCC Rcd 8024 (ALJ 1992).

[5] See *FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994); *Modification of FCC Comparative Proceedings Freeze Policy*, Public Notice FCC 94-204 (Aug. 4, 1994). [Hereafter referred to as the *Freeze Orders*.

of a second further supplemental initial decision on these basic qualifications issues. *Rem Malloy Broadcasting*, 9 FCC Rcd 4822 (Rev. Bd. 1994).

3. The issue against Malloy was specified in connection with Free Air's exceptions to the ALJ's denial of its December 1, 1988 Petition to Enlarge Issues Against Rem Malloy. See *Order*, FCC 89M-116 (released Jan.13, 1989). The Board determined that a financial issue was warranted because there were substantial and material questions of fact: (1) as to whether Malloy lost reasonable assurance of financing between 1986 (when he relied solely on his father's promise of a $250,000 loan) and 1988 (when he secured a $375,000 bank loan and relied in addition on a reduced $150,000 loan commitment from his father), given the substantial decline in his father's net liquid assets between 1986 and 1988; and (2) as to whether Malloy's bank letter remains valid given the financial difficulties of Malloy's father, who has personally guaranteed the bank loan. *Rem Malloy*, 9 FCC Rcd at 4825-26 ¶ ¶ 15-16.

4. The issue against Free Air was specified in connection with the Review Board's consideration of Bernard Dawson's January 11, 1994 Motion to Reopen the Record and Enlarge the Issues. The Board determined that there is a substantial and material question of fact as to whether Free Air has been continuously financially qualified. *Rem Malloy*, 9 FCC Rcd at 4829 ¶ ¶ 27-29. It cited: (1) Free Air's Opposition to the Motion to Reopen the Record and Enlarge the Issues which, in the Board's view, lent credence to the allegations that Free Air's 50% owner, Sara J. Estrada, was responsible for financing at least part of Free Air's application and that she was depending upon her husband's assets to meet her financial commitment to Free Air; (2) the imposition of a $2.6 million tax lien against assets allegedly jointly owned by Mrs. Estrada and her husband, who had entered guilty pleas to tax evasion and conspiracy to defraud the government for which he was fined $20,000 and received a prison term of forty eight months in 1991; and (3) information presented to the tax court characterizing Mr. Estrada's economic resources as only modest.

5. The Board saw no reason to postpone hearings into these issues during the comparative freeze, since resolution of these issues might make it possible to decide this case without any comparative analysis. In the Board's view, a remand is consistent with the *Freeze Orders*, which had directed the Board to continue issuing decisions "in those cases in which consideration of the applicants' comparative qualifications is unnecessary to resolve the case." *Rem Malloy*, 9 FCC Rcd at 4822 ¶ 3, citing *FCC Freezes Comparative Proceedings*, 9 FCC Rcd at 1055; *Modification*, FCC-204 at 2.

REQUESTS FOR EXTRAORDINARY RELIEF

6. Rem Malloy and Free Air [hereafter Movants] seek a waiver of 47 C.F.R. § 1.115(e) to permit an immediate appeal of the Board's interlocutory remand order,[6] and request further that the Commission stay the effectiveness of the Board's remand order. In their respective pleadings, Rem Malloy and Free Air urge that the Board's action is contrary to the comparative freeze, and that, in any event, the issues specified against Rem Malloy and Free Air are not warranted under Commission precedent.

7. Peebles Broadcasting Company, Interactive Media, and Bernard Dawson (Joint Opponents) oppose the requests filed by Rem Malloy and Free Air. They urge that neither has shown the urgent and compelling circumstances necessary to warrant a waiver of section 1.115(e), let alone satisfied the more stringent requirements for a stay. Turning to the merits, Joint Opponents submit that the Board's action remanding the proceeding was consistent with the spirit, as well as the letter, of the *Freeze Orders*, that the Board's interpretation of the *Freeze Orders* deserves deference given the substantial public interest in ending litigation, and that the Board correctly specified financial issues against Rem Malloy and Free Air.

8. *Discussion:* We will dismiss on procedural grounds the requests for extraordinary relief and dismiss as moot the Movants' requests to stay this proceeding pending termination of the comparative freeze. The Board's remand order is an interlocutory action that neither denied the applications filed by Rem Malloy and Free Air nor terminated either applicant's right to participate in this proceeding. Under 47 C.F.R. § 1.115(e) appeals of interlocutory rulings are deferred until after the Board has issued a final decision in the proceeding. As we indicated in *Sound Broadcasting Company*, 6 FCC Rcd 6903, 6903-04 ¶ 6 (1991), "[a] party seeking to proceed other than in a manner prescribed by our procedural rules, including 47 C.F.R. § 1.115(e)(1), has a heavy burden of establishing that the resulting disruption of the proceeding is outweighed by urgent and compelling circumstances which could not be considered by their timely presentation in accordance with those rules." See also *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331 ¶ 3 (1991), citing *George E. Cameron, Jr. Communications*, 51 RR 2d 1419, 1420 (1982).

9. Neither Rem Malloy nor Free Air has met this burden. *Great Lakes*, which both applicants cite, is readily distinguishable. As we noted in *Sound Broadcasting*, the heavy burden of demonstrating compelling and urgent circumstances was met in *Great Lakes* because the petition to enlarge issues was grossly untimely and was based on facts readily discoverable by the moving party, and because, "based on undisputed facts, the motion was without merit." 6 FCC Rcd at 6904 ¶ 7.

10. Here, by contrast, we observe no comparable defects. The Board specified financial issues against Malloy based upon its consideration of Free Air's timely filed exceptions to the ALJ's denial of its December 1, 1988 Petition to Enlarge Issues Against Rem Malloy.[7] With respect to the financial issue specified against Free Air, Bernard Dawson's January 11, 1994 Motion to Reopen the Record and Enlarge Issues against Free Air was, as the Board acknowledged, untimely. We note, however that Free Air's financial proposal was not subject to discovery, that Free Air has not denied the factual premises underlying Dawson's motion (e.g. that Free Air is relying in part on Mrs. Estrada for financing, who in turn is relying on her hus-

[6] Section 1.115(e) of the Commission's Rules provides that appeals of interlocutory actions by the Review Board will be deferred until after the Review Board has made a final decision in the case.

[7] See *Order*, FCC 89M-116 (released Jan.13, 1989). Filed before the close of the hearing record and within fifteen days after the receipt of the deposition transcripts, Free Air's Motion had requested the addition of site availability, financial, and reporting issues against Malloy.

band's economic resources), and that we have been cautioned against imposing an unreasonable burden on a party seeking to raise legitimate questions particularly where the party under scrutiny has exclusive control over the pertinent facts. *See generally California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679-80 (D.C. Cir. 1985). We do not decide at this time whether these circumstances, which the Board cited, warrant the addition of a financial issue against Free Air. Without regard to the correctness of the Board's action, however, these circumstances persuade us that the untimeliness of the underlying Motion to Reopen is not a compelling and urgent circumstance warranting a waiver of section 1.115(e)'s prohibition against interlocutory appeals.

11. Moreover, to the extent that Free Air and Rem Malloy challenge the factual and/or legal basis for the Board's determination to add the issues, their claims provide no basis for the extraordinary relief requested. Arguments that the Board's action is contrary to precedent may be presented to the Commission in a timely filed application for review of the Board's final decision in this case. In addition, a party may request relief pursuant to summary decision procedures before the ALJ to correct any alleged factual errors underlying the Board's determination to add financial issues against these applicants.

12. Nor are we persuaded that there is an equitable basis for the relief requested. In our view, neither the ongoing revision of the comparative process nor the comparative freeze constitutes compelling and urgent circumstances warranting a waiver of section 1.115(e). As the Joint Opponents note, there is a substantial public interest in ending lengthy adjudicatory proceedings and bringing new service to the public that is furthered by the Board's remand order.

13. Furthermore, the remand order is consistent the *Freeze Orders*, which contemplated that the Commission, the Review Board, and the ALJs would continue issuing decisions "in cases in which consideration of the applicants' comparative qualifications is unnecessary to resolve the case." *Modification*, at 2. There is no merit to Movants' claim that the Board's failure to rule on the exceptions concerning the other four applicants contravenes that portion of the *Freeze Orders* indicating that "proceedings w[ould] not be bifurcated to adjudicate the basic qualifications of some of the applicants, where their disqualification would leave unresolved comparative issues involving other applicants." *Id.* In accordance with this proscription against bifurcation, the Review Board properly remanded the proceeding without ruling on those pending exceptions. A ruling on those exceptions would constitute a final decision as to those other four applicants that would be ripe for Commission review under 47 C.F.R. § 1.115 of the Commission's rules. This would in effect bifurcate the proceeding, contrary to the *Freeze Orders*. By remanding the proceeding for hearings on the basic qualifications of two of the six applicants, however, the Board has retained jurisdiction over the proceeding, and it will be in a position to consider exceptions relating to all six applicants once the ALJ has considered the questions concerning the basic qualifications of Rem Malloy and Free Air.

14. Given the public interest importance of expediting new service to the public, we believe that it is appropriate to remand a comparative proceeding for further hearings on a basic qualifying issue where there is a possibility that such hearings may obviate the need to make a comparative choice among other applicants. We are confident, moreover, that the Board, mindful of the need to avoid unnecessary hearings, would not have ordered these hearings unless it concluded, based upon a careful evaluation of all pending exceptions, that the disqualification of Rem Malloy and Free Air could obviate the need for further comparative analysis in this proceeding. See *Elinor Lewis Stephens*, 9 FCC Rcd 5259 (Rev. Bd. 1994), application for review pending, in which the Board refused to entertain an interlocutory appeal of an ALJ's refusal to issue a partial Initial Decision on all non-comparative hearing issues in a three party comparative case, noting that "[t]he Board is not in a position to evaluate whether the basic qualifications issues in this case would be decisional, nor do[es] [it] have any basis for concluding that the ALJ had abused his discretion." Id. ¶ 4. In *Stephens*, the Board distinguished *Rem Malloy*, where "the exceptions and other factual record that were properly within [its] *review* function . . . indicated that resolution of basic qualification issues 'may make resolution of the proceeding possible without any comparative consideration.'" *Id.* (emphasis added). Whatever the merits of the Board's decision in *Stephens*, which we do not prejudge in any way, its distinction of *Rem Malloy* in that case indicates that it has ordered further hearings in this case based upon more than a cursory review of the pending exceptions. Thus, resolution of the financial issues specified against Rem Malloy and Free Air may, as the Board reasoned, permit resolution of the case without further comparative analysis, inasmuch as the ALJ found three of the other four applicants are disqualified and exceptions filed with the Review Board dispute his finding that the fourth applicant is qualified.

15. We recognize that neither of these applicants can reliably assess its likelihood of prevailing under the comparative issue, pending resolution of the rulemaking proceeding in GC Docket 92-52 which proposes to revise the criteria used to select among competing applicants.[8] It may be true, as Movants suggest, that an applicant's comparative position can affect its willingness to adjudicate its basic qualifications. However, longstanding precedent holds that only basically qualified applicants are entitled to any comparative consideration. Notwithstanding their inability to evaluate their prospects under the revised comparative criteria at this time, there is nothing unfair about requiring Rem Malloy and Free Air to litigate their basic qualifications prior to completion of the proposed revision of the comparative criteria.

16. Finally, our action herein is consistent with *Thomas W. Lawthorne*, 9 FCC Rcd 4475 (1994). That case involved two applicants, and basic qualifications issues had been specified against one applicant before the freeze on comparative proceedings. As in this case the comparative issue would be moot only in the event of an adverse determination on the specified issue and the applicant would, as a result of our remand order, be required to litigate its qualifications before completion of the ongoing rulemaking

[8] *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664 (1992); 8 FCC Rcd 5475 (1993); 9 FCC Rcd 2821 (1994).

proceeding that proposes to revise the criteria used to select among fully qualified applicants that are mutually exclusive.

MOTION TO DISQUALIFY COUNSEL

17. Free Air seeks to have Lawrence Bernard, who represents Bernard Dawson, disqualified from further participation in this proceeding because of an alleged conflict of interest stemming from Bernard's purported affiliation in 1990-91 with the law firm of Putbrese & Hunsacker (P&H), which represented Free Air in this proceeding from 1986 to 1988. According to Free Air, Bernard's representation of Dawson violates the D.C. Bar Rules of Professional Conduct and the ABA Code of Professional Responsibility. It notes that the issues specified by the Board (as a result of Dawson's late-filed Petition to Reopen) seek inquiry into Free Air's 1986 certification of its financial qualifications, that P&H represented Free Air at the time of that certification, and that Bernard, by virtue of his previous association with P&H, would have had access to P&H's files indicating the basis of the 1986 certification and the source of its funding. Thus, Free Air claims that Bernard is subject to a serious conflict of interest in that he must zealously advance Dawson's interests and he has a conflicting duty, pursuant to ABA and D.C. Bar Rules, to protect the confidentiality of any information in P&H's files concerning Free Air's application.

18. As Dawson contends, Free Air's allegations -- which are not supported by affidavits or other documentary evidence -- are entirely speculative and without merit. Free Air would have us infer that Dawson's Petition to Reopen was based upon confidential information simply because it raised questions as to the source of the applicant's funding at a time when it was represented by P&H's David Hunsacker. However, statements under penalty of perjury from David Hunsacker and Lawrence Bernard reflect that Bernard was never a member of P&H, that his association with P&H was only an office-sharing arrangement that did not afford Bernard access to confidential files concerning any P&H client (including Free Air), and that Bernard never discussed the merits of this case with David Hunsacker or with any other P&H attorney. Under these circumstances, we find that, although Dawson and Free Air have adverse interests, Bernard's representation of Dawson creates no actual conflict of interest that warrants his removal from this case.

19. In this regard, *Dorothy J. Owens*, 104 FCC 2d 848 (Rev. Bd. 1986), review denied, 2 FCC Rcd 38 (1987), cited by Free Air, is readily distinguishable. There, an attorney simultaneously represented in one ongoing Commission proceeding an applicant having an 18% non-voting stockholder who was also a 70% limited partner in an opponent of counsel's client in a second proceeding. This created a serious conflict of interest since the interests of the two clients were in sharp conflict, pleadings filed by the attorney as well as oral statements to the ALJ strongly supported the inference that the attorney had been privy to confidential information that could be used against the client's best interest in the second case, and that inference was not rebutted by the attorney's self-serving denials. In contrast, Lawrence Bernard, who represents Bernard Dawson, never served as counsel for Free Air or any of its principals. Nor was he ever a member of the law firm that represented Free Air. Thus, while Free Air and Dawson have sharply opposing interests, Bernard's representation of Dawson involves no impermissible conflict of interest.

20. Free Air also urges, however, that Bernard's former association with P&H creates an appearance of a conflict of interest that jeopardizes the integrity of this proceeding, and that statements denying that Bernard had access to confidential information concerning Free Air and downplaying his connections with P&H must be disregarded as self-serving. In *Dorothy J. Owens*, which Free Air cites in this regard, an attorney was removed from further participation because pleadings as well as oral representations to the Presiding Judge undermined his claim that he was not privy to privileged information, not merely because that claim was deemed to be self-serving.

21. Nothing comparable belies the credibility of the claims in this case. Dawson's Petition to Reopen does inquire into the basis of Free Air's financial certification during its representation by P&H. However, the petition relies entirely on Attachments consisting of an excerpt from Free Air's 1986 application and of publicly available documents that postdate the time during which Bernard shared office space with P&H. Thus, we find not even a hint of impropriety that would warrant disqualifying Bernard from further participation in this proceeding. See *Miller Broadcasting, Inc.*, 98 FCC 2d 725, 729 (Rev. Bd. 1984), indicating that, once a hint of actual conflict develops, an attorney is expected to remove himself. We conclude therefore that Bernard's continued representation of Dawson will not jeopardize the integrity of this proceeding.

ORDERS

22. ACCORDINGLY, IT IS ORDERED, That the Emergency Motion for Extraordinary Relief, filed September 19, 1994 by Rem Malloy Broadcasting; and the Emergency Petition for Extraordinary Relief, filed September 19, 1994, by Free Air Corporation ARE DISMISSED; and that the Joint Motions to Strike Reply, filed on September 29, and on October 7, 1994, by Peebles Broadcasting Company, Interactive Media, and Bernard Dawson (Joint Opponents) ARE DISMISSED as moot.

23. IT IS FURTHER ORDERED that the Motion to Disqualify Counsel, filed September 19, 1994, by Free Air Corporation IS DENIED, and that the Motion to Strike Reply, filed October 5, 1994 by Bernard Dawson IS DENIED.[9]

24. IT IS FURTHER ORDERED That the Motion to Stay, filed September 19, 1994, by Free Air Corporation, and the Motion to Stay Proceeding, filed September 19, 1994, by Rem Malloy Broadcasting ARE DISMISSED as moot.

[9] In its Motion to Strike, Dawson asserts that Free Air's Reply is improper under 47 C.F.R. § 1.294(b), which provides that replies to oppositions to an interlocutory request will not be entertained. In its Opposition, Free Air urges that its Motion to Disqualify Counsel is analogous to a motion to dismiss an applicant from the proceeding, and that section 1.294(c) would permit the filing of a reply. Without reaching this question, we believe that, in view of the seriousness of the contentions raised in the Motion to Disqualify, it is appropriate that we consider Free Air's reply. We therefore deny the Motion to Strike.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-130

In the Matter of

Amendment of Parts 73 and 74 of the Commission's Rules to permit unattended operation of broadcast stations and to update broadcast station transmitter control and monitoring requirements.

NOTICE OF PROPOSED RULE MAKING

Adopted: November 10, 1994; Released: December 7, 1994

Comment Date: January 20, 1995
Reply Comment Date: February 6, 1995

By the Commission:

INTRODUCTION

1. The primary purpose of this rulemaking proceeding is to determine whether and under what circumstances the Commission should waive the requirement that a broadcast station must have a licensed radio operator on duty in charge of the transmitter during all periods of broadcast operation. Congress recently passed the Telecommunications Authorization Act of 1992, Pub. L. No. 102-538, 106 Stat. 3533 ("Law") to amend the Communications Act of 1934 ("Act") to permit the Commission to consider this option. While this Law concerned the authorization of funding for the National Telecommunications and Information Administration, it also made several amendments to the Act. Specifically, Section 205 (1) of the Law amended Section 318 of the Act, which generally requires that the transmitting apparatus of any licensed radio station be operated only by personnel specifically licensed by the Commission. Pursuant to Section 318, the Commission may waive or modify the operator requirement for all but specifically enumerated types of stations. The Law removed from the waiver/modification prohibition "(3) stations engaged in broadcasting ...." Our proposal includes waiving our current requirement that broadcast station duty operators possess a license or restricted permit. Reducing the application filing burdens and costs imposed on those station employees is part of our effort to reinvent government. Eliminating the application processing requirement will also save Commission resources. Secondarily, we propose to update various transmitter control requirements to make them more relevant to unattended operation and to be responsive to commonly asked questions concerning their interpretation.

BACKGROUND

2. Section 73.1860 of the Commission's Rules requires that each AM, FM or TV station must be operated by a licensed transmitter duty operator ("duty operator") holding a commercial radio operator license or permit of any class. Such a person is responsible for the proper operation of the station's transmitter and must be on duty at either the transmitter site,[1] a remote control point,[2] or an Automatic Transmission System (ATS) monitor and alarm point.[3]

3. The majority of duty operators hold the Restricted Radiotelephone Operator Permit (widely called the "RP") which is the lowest class of such a license. Applicants for the RP simply certify that they can keep at least a rough written log, that they are familiar with applicable treaties, laws, rules and regulations governing the radio stations they will operate, that they can speak and hear and that they are legally eligible for employment in the United States. Applicants are not required to pass a written test or otherwise demonstrate their knowledge of station operations to obtain this class of license. There is a nominal application fee and the RP is valid for life.

4. Section 73.1860(c) of our rules specifically requires a broadcast station licensee "to ensure that each transmitter operator is fully instructed and capable to perform all necessaryobservations and adjustments of the transmitting system and other associated operating duties to ensure compliance with the rules and station authorization." The Commission holds the broadcast station licensee responsible for rule violations or operation that is not in accord with the station authorization.

DISCUSSION

PART I -- Unattended Operation.

5. Our proposal includes multiple elements: first, we propose to waive the requirement for duty operators at broadcast stations; second, for those stations that choose to retain duty operators, we propose to waive the requirement that the duty operator hold an RP; and third, we propose various changes to those rules that would be affected by our waiving the duty operator requirements. Our basic premise in this proceeding is that the requirement for a licensed duty operator and the costs and burdens imposed by such requirement no longer appear to be necessary or

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[1] Extension meters are required in situations where the duty operator is located at the transmitter site, but too far from the transmitting equipment to permit direct visual observation of the meters indicating the status of the station's operation.

[2] A remote control point is a position at some location other than the transmitter (most often the main studio) from which the transmitter can be monitored and controlled.

[3] An Automatic Transmission System consists of monitoring devices, control and alarm circuitry, arranged so that they interact automatically to operate a broadcast station's transmitter and maintain technical parameters within licensed values. In the event of a malfunction, the equipment can be programmed to contact the duty operator so that appropriate remedial action can be undertaken. However, once the ATS determines an out-of-tolerance condition that cannot be corrected within 3 minutes, the station is automatically taken off the air.

appropriate in light of the many improvements which have been made in the stability, reliability and automatic control of transmission systems.

Duty Operator Requirement

6. We propose to waive the requirement for duty operators at broadcast stations and thus permit their unattended operation. Today many stations function (particularly during the evening and early morning hours) with the duty operator located at a control point at the duty operator's home or some other location. Some licensees use employees of telephone answering services as duty operators. Where station programming is provided by satellite, technical systems may be employed to permit station control from a location a great distance away. There are firms which provide third-party transmitter control (duty operator) services for licensees who wish to automate their stations for part (or all) of the day. Our knowledge obtained from inspecting stations and reading the technical literature suggests that in many such cases, with ATS equipment, it is rare that the duty operator is contacted (by the ATS monitoring equipment) concerning equipment malfunction. It thus appears that modern monitoring and control equipment has rendered the need for the duty operator largely superfluous for a great many stations, and this level of automation should be readily available to most broadcasters.

7. This proposal is also based on our belief that most broadcasters exercise due diligence in the operation of their stations. We want to emphasize that the changes in the rules that we propose in no way diminish, much less eliminate, the responsibilities of licensees to adequately monitor technical operation and to adjust and maintain their stations in compliance with the technical rules. Over the years we have altered our approach to technical regulation in the broadcast services, shifting away from step-by-step "how to" language in the rules, to focusing more on licensees' exercise of good judgment. Our intent has been to allow licensees to adopt the most cost-effective operating and maintenance policies appropriate for their stations. We have stated that licensees who do not show reasonable effort to ensure proper station operation will be viewed as willfully violating the rules.[4]

8. We continue to believe that this approach is sound. However, because permitting unattended operation represents a significant change in our policies relating to transmitter control, we want to explore the potential ramifications thoroughly. In particular we solicit comment on whether concluding that duty operators are not generally necessary might encourage negligence or irresponsibility on the part of certain broadcast licensees, with the result that interference levels in the various broadcast services might be exacerbated.

9. Under our primary proposal, licensees would be afforded maximum operational flexibility to employ any of a number of methods of transmitter control. Direct manual or remote control by a station employee or other person designated by the licensee would remain an option. Another method of achieving such compliance would be the use of specially designed, highly stable state-of-the-art transmitters. The use of accurate automated measurement and control (ATS-like) equipment would be another method of achieving reliable, unattended system control. A discussion of the specific requirements is contained in Part II of this document. Whatever method is employed should be based on the design characteristics of the particular technical facilities. From an enforcement standpoint, we propose to place more emphasis on the technical integrity of emitted signals than with the method of transmitter control.

10. As an alternative to the above, we seek comment on whether we should permit unattended operation of broadcast stations only if they are ATS-equipped, inasmuch as such stations are required to go off the air if operating parameters conducive to interference go out of tolerance. Under the current rules, in such an eventuality, the ATS equipment would contact the duty operator to report the technical problem so that appropriate remedial action could be undertaken. Under a potential new rule, because no one would be required to be notified about an out-of-tolerance condition, the transmitter could simply be taken off the air by the ATS equipment after a short period of time.

11. We request specific comment on whether some types of stations (particularly directional AM stations without approved antenna sampling systems, which we believe to be potentially the most technically unstable type of broadcast station) should be excluded from unattended operation under the proposed rules.[5] We request comment on whether licensees of these stations would particularly benefit from the unattended operation we herein propose, and whether unattended operation is appropriate from an operational standpoint. We believe that licensees could operate their stations properly in the unattended mode with monitoring equipment which would measure and record their directional antenna performance every three hours. However, we solicit comment on the degree to which such a requirement is actually necessary; and if it is, to what degree these licensees can afford to install the appropriate equipment.

12. We also ask for comment on any other circumstances that may not lend themselves to effective unattended station operation. With respect to the unique problems associated with AM station operation, for example, we welcome comment on whether equipment exists which can reliably verify that a successful change has been made from the daytime to nighttime antenna pattern (and vice versa) and whether the appropriate transmitter power level can be verified. Can these types of station changes be fully automated, or do they require human verification?

13. We want to emphasize that in proposing to permit unattended operation at all or at some stations we would not preclude licensees from operating their stations in the attended mode, which requires that some responsible person be in charge of the station. However, even if a person performing the function of a duty operator is employed optionally, we question the need to specify their duties in detail, as they could vary widely from station to station. Parties are asked to comment on the various proposals above and their underlying assumptions, and to bring to our attention any aspect of the proposal that we may have overlooked. We also seek information on the benefits derived by licensees from any waiver or diminution of our operator requirements.

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[4] *See Report and Order* in BC Docket No. 82-537, FCC 83-338, 48 FR 38473, August 24, 1983.

[5] We estimate that there are about 200 such AM stations.

14. While we have focused on AM, FM and TV stations licensed under Part 73 of our rules, we also propose to offer similar flexibility to low power TV stations, which are authorized under Part 74. In addition, we seek comments on whether it is appropriate to consider changes to the operator requirements for international broadcast stations authorized pursuant to Subpart F of Part 73 or experimental broadcast stations authorized pursuant to Subpart A of Part 74. We request comment on whether circumstances exist that warrant different treatment for low power TV, international broadcasting or experimental broadcast station licensees. In this inquiry, we are cognizant that Section 318 of the Act continues to prohibit waiver of the operator requirement where required by international agreement or where licensed operators are required for safety purposes. 47 U.S.C. § 318. Commenters are requested to address the implications of these statutory provisions, and particularly the latter issue of safety. We also note that various rule sections concerning broadcast auxiliary, ITFS and FM translator services refer to operators and would need to be modified.

15. We also request comment on the effect of our proposal on two important responsibilities imposed on broadcast licensees that may or may not be assigned to duty operators. The duty operator may be tasked with verifying that the antenna tower lighting system is functioning properly. However, automating this function does not seem technically difficult. Moreover, continuous monitoring of tower lighting electronically would appear to provide greater aviation safety benefits than having a duty operator or other station employee personally check the lights only once a night. Nevertheless, recognizing that this is a particularly important issue, we request comment on the degree to which this function has already been automated and to what degree such automation is possible in view of the goals of this proceeding. We note that the current rules do not require that this function be performed by the duty operator. Any station employee may be delegated this responsibility.

16. The duty operator also may be charged by the licensee with the responsibility for monitoring for Emergency Broadcast System (EBS) alerts, logging their receipt, and determining the appropriate response to be taken. The current EBS system is under review in FO Docket Nos. 91-301 and 91-171.[6] Briefly, in a *Report and Order and Further Notice of Proposed Rule Making* adopted concurrently with this *Notice*, the current EBS alerting procedures will be phased out and replaced with a new Emergency Alert System (EAS) which may be completely automated at the discretion of each licensee.[7] As new EAS equipment should be available by the time this proceeding is completed, we seek comment as to whether we need to consider how licensees might automate the current EBS system.

17. In considering when we might make the proposed rule changes effective, we note that the current emergency broadcast system does, for the most part, require manual intervention; retention of the operator requirement until the current equipment is replaced might help ensure a prompt and proper response to EBS activations and tests. Therefore, it may be appropriate to establish the effective date for the waiver of the requirement for duty operators to coincide with the date that new EAS equipment becomes mandatory for broadcasters. However, we have decided that we will authorize use of the new EAS equipment on a state or local area basis in advance of the overall conversion date when certain conditions are met.[8] Accordingly, to encourage that process, we could permit those stations which are authorized to use the new EAS equipment to operate unattended after the new EAS equipment has been installed and the stations are otherwise equipped to meet their operational responsibilities. We seek comment on whether this proposal will promote the rapid implementation of the new Emergency Alert System.

18. If a commenting party supports retention of the operator requirement for certain functions or certain classes of stations, we request they provide us with information which demonstrates that tangible benefits would derive from its retention.

PART II -- Related rule changes and other clarifications

RP Requirement

19. We now consider the question of whether, for those stations that choose to retain duty operators, the duty operator should be required to hold an RP. It appears that the knowledge and physical capabilities required for the RP do not differ materially from those required of any other station employee, nor do they suggest some critical or indispensable skills without which stations could not function safely and properly. It thus appears that the requirement that a duty operator possess an RP has little or no impact on the quality of a broadcast station's operation.

20. Moreover, the duties explicitly imposed on duty operators by our rules would not ordinarily justify the employment of a person for that purpose alone. Duty operators are tasked with ensuring the proper technical operation of the broadcast transmitter during the times they are on duty. This entails routinely reading the meters of the station transmitter or special measurement instruments that indicate a station's operating parameters, such as power and modulation. For directional AM stations it may also mean checking the antenna base currents (to determine the power actually fed to each antenna) and each antenna's sample current amplitudes and phase relative to the reference antenna (when all of these parameters are within tolerance, the directional array can usually be assumed to be performing properly).

21. Licensees usually require duty operators to perform many functions at their stations in addition to those required by our rules. For radio stations, this often includes aurally monitoring the station's broadcast signal to ensure that audio quality is satisfactory and that any studio-to-transmitter ("STL") equipment that may be used is operat-

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[6] *See Notice of Proposed Rule Making/Further Notice of Proposed Rule Making* in FO Docket Nos. 91-301 and 91-171, 7 FCC Rcd 6903 (1992), which consolidated actions under consideration in the *Notice of Inquiry* in FO Docket No. 91-171, 6 FCC Rcd 4265 (1991) and the *Notice of Inquiry* in FO Docket No. 91-301, 6 FCC Rcd 6739 (1991).

[7] *See Report and Order and Further Notice of Proposed Rule Making* in FO Docket Nos. 91-171 and 91-301, FCC 94-288, adopted November 10, 1994.

[8] *See* "Implementation timetable" discussion in *Report and Order and Further Notice of Proposed Rule Making* in FO Docket Nos. 91-171 and 91-301, FCC 94-288, adopted November 10, 1994.

ing properly. Operators may also be required to clean and maintain tape recorders and other types of program source equipment so as to ensure their proper frequency response and distortion levels, to make copies of commercials for airing, or to record events or programs for future broadcast. However, none of these duties require possession of an RP, nor are they required by the Commission's Rules. The duties just enumerated could be done by any station employee with the required expertise or training. We thus propose to waive the RP requirement for duty operators, and seek comment on this proposal.

22. We turn next to a discussion of specific aspects of traditional station operation which would be affected by the proposed change in our policy with respect to transmitter control.

23. Several incidental benefits, such as potentially reducing the cost of complying with metering requirements, would result from the regulatory changes proposed above. For example, no longer specifying the duty operator's position would permit us to eliminate the proximity and adjustment requirements currently contained in Section 73.1860(b). Because the rules generally do not specify how often meters must be read, the distance between the duty operator's normal position and the transmitter's indicating meters does not appear to be particularly important and therefore, not in need of specification. This proposed change would also make it appropriate to delete Section 73.1550, which specifies the requirements for extension meters. This would eliminate any need for licensees to install cameras so as to be able to view transmitter meters at a remote location -- an alternative currently permitted in lieu of using extension meters. In addition, references to extension meters would be eliminated from Sections 73.53, 73.57, 73.69, 73.1230, 73.1820, and 73.1860. In constructing the proposed rule changes, we attempted to improve the rules' clarity. For example, Section 73.57(d) currently requires calibration of remote reading antenna and common point ammeters as often as necessary to ensure their accuracy. This provides little useful guidance. The essential requirement in Section 73.57(d) is that each such ammeter be accurate within 2% of the value read on the station's corresponding regular ammeter. We propose to change the rule to require just that. We would reiterate that in eliminating these "how to" kinds of requirements, licensees would still be free to employ the former traditional transmitter monitoring techniques; but again, such a decision should be consistent with the broader objective of monitoring and adjusting technical parameters to ensure that stations comply with the rules and conform to their authorizations.

Contact Person

24. We believe that at times it may be useful for the Commission or other government agencies to be able to contact broadcast licensees promptly. One possibility for achieving this might be for each licensee to provide the Commission with the name and telephone number of a contact point, as is currently required by Section 74.734(a)(4) of our rules for unattended operation of low power TV and TV translator stations and by Section 74.1234(a)(4) of our rules for unattended operation of FM translator and FM booster stations. In considering this possibility, we recognize that there are over 13,000 AM, FM and TV broadcast stations and we are concerned that attempting to maintain such a master list could be unwieldy, time consuming and largely ineffective. However, if a master list were placed on a data base accessible to broadcast licensees, perhaps a system could be devised whereby a licensee, through the use of a telephone and a password allowing access to that licensee's information only, could update the list and make any necessary changes on his or her own. Thus, the Commission would only need to verify that the licensee has placed information on the system (say at the time of granting or renewing the license) and then the responsibility of keeping the information current would lie with the individual licensees. In this way, Commission access to the information would be prompt (a database search would take seconds) while the process of keeping the information current could be made less burdensome both to the Commission and individual licensees through the automated update procedure. We note that another alternative might be derived from current requirements in Sections 74.765 and 74.1265 of our rules that the telephone number and address of the licensee or the licensee's local representative must be posted at the station's transmitter site on the structure supporting the transmitting antenna. Those rules, which apply to low power TV, TV translator, TV booster, FM translator and FM booster stations, require the display to be visible to a person standing on the ground and maintained in legible condition. Accordingly, we seek comment on whether this objective is reasonably attainable and solicit any concrete suggestions. Alternatively, are there informal procedures in place that are effective and obviate the need for a more regulatory approach?

Maximum time period for non-compliance correction

25. In some cases the current rules set varying time limits for correcting out-of-tolerance conditions. For example, Section 73.1410(e), which governs operation of remotely controlled transmitters, requires that if a malfunction causing operation beyond the terms of the station authorization cannot be corrected by remote control, operation must terminate immediately. Section 73.1500(e) requires automatic transmission systems to terminate station transmission within three minutes if an operating condition capable of causing interference is not corrected. Section 73.1560(d) permits operation at reduced power to continue, if the licensee notifies the FCC by the tenth day of reduced power operation. In many circumstances, such as at a directly controlled transmitter or with an operating condition that poses no threat of interference, the existing rules give no guidance regarding how long an out-of-tolerance condition can continue while correction is attempted. These varied requirements have lead to confusion, not only about correcting out-of-tolerance operating conditions, but also about the underlying responsibility to operate stations in accordance with the technical rules. To emphasize that stations must comply with the tolerances specified in the various technical rules, we propose to clearly establish procedures for continued operation with some additional out-of-tolerance conditions that pose little or no threat of interference, while removing language that seems to suggest it is permissible to continue operating while trying to correct an out-of-tolerance condition that is capable of causing interference.

26. Out-of-tolerance conditions fall into one of two categories. Conditions in the first category are those which pose little or no threat of increasing interference to other stations. Some of these conditions are addressed in the existing rules with procedures for continuing operation. This includes reduced power operation, use of an emer-

gency antenna pursuant to Section 73.1680, and operation during modification of facilities in accordance with Section 73.1615. Other rules that permit temporary non-conforming operation include Sections 73.58, 73.68, 73.69, 73.258, 73.688, 73.932 and 73.1550, which address malfunctioning monitors and indicating instruments. Other conditions, such as TV visual waveform carrier levels and timing tolerances, and undermodulation also appear to fit in this category.

27. Accordingly, we propose to modify Section 73.691 and 73.1570, respectively, to establish procedures for such variances. The Commission generally uses a special temporary authorization (STA) to permit a station to operate for a limited period of time at a specified variance from the terms of its authorization or the requirements of our rules. Each STA is limited to a maximum duration of six months, but it can be renewed. We propose to expand the list of rules cited in Section 73.1635(a)(5) of the current STA rule, to identify the additional types of out-of-tolerance conditions that do not require immediate Commission approval. We propose that notification to the Commission be required if these out-of-tolerance conditions exceed ten days, and authority (STA) from the Commission be required if the conditions remain after 30 to 90 days. We request comments on our proposals, as well as suggestions of other specific parameters that can be occasionally out-of-tolerance and not readily adjusted to proper operation but with no risk of interference. We only propose rules to govern temporary continuation of non-compliant operation. Changing or eliminating the underlying technical requirements is beyond the scope of this proceeding.

28. The second category of out-of-tolerance conditions are those that are capable of causing interference. Examples of operating conditions in this category are overmodulation, carrier not within frequency tolerance, AM directional array parameters out-of-tolerance, excessive AM monitoring point field strengths, incorrect antenna pattern and the transmission of excessive power (typically the use of daytime power at night by an AM station). The current rules require that such conditions be corrected more or less immediately in the case of ATS and remotely controlled stations; otherwise station operation must be terminated. We believe this requirement should be consistent for all types of station operation. Therefore, we propose to apply the three minute limit currently applicable to ATS stations (and which we regard as functionally "immediate") to remote and directly controlled stations. It is for this reason that "immediate" has been replaced by "within three minutes" in the proposed rules set forth in Appendix A.

29. Nevertheless, we seek comment on whether the three minute time limit affords adequate opportunity for remedial action. Clearly, equipment malfunction capable of causing interference cannot be permitted to continue for more than a brief period while remedial action is attempted. Most types of equipment malfunction should be capable of correction while the station is operating into a dummy load instead of into its antenna system. Correction of a few types of malfunctions may require putting the station on the air, at least briefly. Therefore, we would propose not to hold a station accountable for out-of-tolerance operation provided it does not continue for periods longer than three minutes. This time length would appear adequate to measure a particular parameter to see if it is within the limit. However, we solicit comments on this proposal.

30. For AM stations using directional arrays, additional considerations apply. Whenever array operating parameters fall outside the tolerances specified in Section 73.62, we presume the array is radiating excessively in some direction(s). Unfortunately, ascertaining whether the inverse distance groundwave or skywave field of a directional array exceeds authorized limits is a complex, time consuming, and often, very expensive proposition involving, minimally, the undertaking of a partial proof of performance. On occasion, however, it is possible, but less likely, that an out-of-tolerance condition for a directional array might not result in excessive radiation or might be caused by transitory events such as severe weather or unusually wet or dry soil conditions. In view of this possibility, forcing a directional AM station to terminate operation or reduce power may be unreasonable.

31. On the other hand, we cannot ignore the possibility that excessive radiation and interference may result if the out-of-tolerance condition continues. Since it is not reasonable to expect the performance of a partial or full proof in the immediate exigencies of such situations, we propose to codify our longstanding policy calling for field strength readings of the monitoring points specified in the station license as the best quickly available and easily determined approximate indicator of radiated field strength until normal array operation has been restored. If any monitoring point exceeds its authorized limit, excessive radiation will be presumed to exist until acceptable station performance is verified by a proof of performance. Because the monitoring points for directional AM arrays are often located miles from the transmitter site and scattered in various directions and over different terrain, a station cannot determine immediately if any of its monitoring point field strengths are excessive. Therefore, in recognition of the unavoidable logistical delays involved in reading the monitoring points, we propose a procedure that starts with recording the out-of-tolerance condition in the station log. Then, we would allow up to 24 hours for the station to dispatch field personnel to read and log all the monitoring point field strengths for each mode of adversely affected directional operation. If any monitoring point field strength is found to exceed its specified limit, the station would be required either to terminate operation or to reduce power. Finally, we believe that all monitoring points should be read and logged again whenever any array parameter changes, as long as it remains out of tolerance. *See* proposed amendments to Sections 73.62 and 73.158.

Monitoring requirements

32. During normal daily operation, several of a station's operating parameters may vary. Factors such as transmitter and antenna configuration, power line voltage regulation and environmental conditions at the transmitting site determine the degree of variation and whether any particular parameter exceeds compliance limits.

33. We often receive inquiries asking which particular technical parameters should be monitored (and how often) in order for the licensee to comply with the rules. We continue to believe that the optimum monitoring schedule varies from parameter to parameter and station to station. However, inspections of broadcast stations by our Field Operations Bureau (FOB) reveal many technical violations involving antenna lighting, overpower operation, improper directional antenna patterns, and overmodulation conditions that could be cured if licensees gave closer attention to monitoring operating parameters and the general main-

tenance and adjustment of their stations. To help licensees meet their responsibility, we propose to list as minimum requirements the basic parameters that every station should be able to monitor and control.

34. We propose that each licensee be able to monitor and adjust its transmitter power and modulation level. In addition, licensees responsible for broadcast towers that require lighting would need to monitor such lighting. Finally, each licensee of an AM station that changes its mode of operation during the broadcast day would need to monitor and control such changes. Licensees of AM stations employing directional arrays would need to be able to monitor and control the array parameters. In the context of unattended operation, the monitoring and control of these parameters must be performed by equipment that would take the station off the air (if a parameter variance capable of causing interference occurred) or else contact some person designated by the licensee (this would appear particularly appropriate in the case of a tower lighting failure).

35. We caution licensees that an occasional glance at a few meter readings does not and cannot constitute an adequate monitoring program. Licensees must implement monitoring procedures to detect and correct problems before technical limits are exceeded. Because actual monitoring procedures, schedules, and technical analyses needed to comply with our rules can vary with each station, we will continue to leave particular methods of implementation largely to the discretion of the licensee. The status of tower lighting must be checked at least once daily consistent with Section 17.47. However, we stress that a licensee must arrange somehow to ensure that transmission system parameters are in compliance and an inability to correct an out-of-tolerance condition would still require termination of station operation (a basic control function that always must be provided). *See* proposed Section 73.1350(b)(2) and (d).

36. At the present time, carrier frequency measurement is not required on a regular basis (*see* Section 73.1540), despite the possibility that operation outside the prescribed tolerances could result in interference. We request information on this subject. Specifically, is frequency a parameter that ATS systems typically control and monitor? What useful purposes, if any, would be served by including it in the list of parameters that we propose be monitored and controlled at an attended operation?

Measurement and calibration requirements

37. Our current rules require that some measurements be made as often as necessary to ensure that the station meets our technical standards. Licensees must also measure periodically parameters not normally monitored on a frequent basis to check the overall stability of the station and must have a preventive maintenance program to keep the station in good operating order. This responsibility, now primarily implicit as "good engineering practice," must be met in a reasonable, consistent manner. We believe that proposed Sections 73.1350(f) and 73.1580, set forth in Appendix A, adequately stress this responsibility.

38. Instruments used to monitor station technical parameters must also be calibrated and adjusted to provide an accurate measure of station operation. The accuracy of a measurement is affected by cumulative errors from several sources, including the calibration source, the instrument itself due to environmental and other external factors, and the method of indicating the parameter under measurement. These errors can be predicted using various engineering methods. Such errors must be considered when monitoring a parameter so that the true value of the parameter falls within the relevant technical limits. While the current rules require that instruments be calibrated as often as necessary, they do not address calibration and measurement errors. We propose to add a new Section 73.1350(c)(2) to address how these errors are to be taken into account, as detailed in Appendix A.

Adjustment of the transmitter and antenna system

39. Licensees must also ensure that their transmitters and antenna systems are maintained and adjusted to comply with the rules. Licensees may delegate such duties to technically competent persons. Thus, adjustment of the transmitter may be performed by anyone authorized by the licensee. We propose to make this point more explicit, as in proposed Section 73.1350(b) in Appendix A.

Permissible connection methods for remote control

40. For licensees who may wish to continue to employ remote control operation, we propose to allow the use of any method to connect the employee's remote control and monitoring point with the transmitter as long as it permits the duty operator to quickly turn the transmitter off. Any delay caused by the connection method would be included in the three-minute time period proposed to be allowed for correcting an out-of-tolerance condition. Thus, methods that depend upon non-dedicated control circuits such as "dial up" facilities would require that the transmitter remote control system include an alternate method of quickly acquiring on-off control. We also propose to continue letting the licensee select how monitoring information will be made available to the responsible employee. Licensees might use dedicated wireline circuits, public switched telephone network circuits, microwave radio circuits, or circuits multiplexed on the broadcast signal. The particular method chosen need not provide continuous data, but the employee must have rapid access to essential monitoring data.

CONCLUSION

41. We believe that the rule changes and deletions we are proposing will be responsive to the desires of broadcast licensees who may prefer to operate their stations in an unattended mode. At the same time, we are proposing revisions to traditional rules which may serve as guidelines for those licensees who desire to continue attended station operation. Also, we believe the proposed changes should be responsive to most of the questions we have received concerning permissible transmitter monitoring and control systems. Other suggestions by interested parties as to how these rules may be amended to provide needed clarity, while retaining the maximum possible amount of operational flexibility, will be welcome.

ADMINISTRATIVE MATTERS

42. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **January 20, 1995**, and reply comments on or before **February 6, 1995**. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of

your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new and modified information collection requirements on the public. Those proposed rules that contain information collection requirements will be sent to the Office of Management and Budget, which is entitled by law to take up to 60 days to file its comments with us.

43. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission Rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

44. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

45. Further information on this matter may be obtained from James E. McNally, Jr. or Gordon W. Godfrey, Mass Media Bureau, Engineering Policy Branch, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachments: Appendices A and B

APPENDIX A

Title 47 of the Code of Federal Regulations Parts 73 and 74 are proposed to be amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334.

2. Section 73.53 would be amended by revising paragraph (b)(9) to read as follows:

§73.53 Requirements for authorization of antenna monitors.

* * * * *

(b) ***

(9) The monitor, if intended for use by stations operating directional antenna systems by remote control, shall be designed so that the switching functions required by paragraph (b)(7) of this section may be performed from a point external to the monitor, and phase and amplitude indications be provided by external meters. The indications of external meters furnished by the manufacturer shall meet the specifications for accuracy and repeatability of the monitor itself, and the connection of these meters to the monitor, or of other indicating instruments with electrical characteristics meeting the specifications of the monitor manufacturer shall not affect adversely the performance of the monitor in any respect. The type approval or notification designations and the instruction manuals for monitors not designated for external switching of the indications as specified in this Paragraph shall clearly show that the monitors are not acceptable for use at stations using remote control for the operation of directional antennas.

* * * * *

3. Section 73.57 would be amended by revising paragraph (d) to read as follows:

§73.57 Remote reading antenna and common point ammeters.

* * * * *

(d) Each remote reading ammeter shall be accurate to within 2 percent of the value read on its corresponding regular ammeter.

* * * * *

4. Section 73.62 would be amended by revising paragraphs (b) and (c) to read as follows:

§73.62 Directional antenna system tolerances.

* * * * *

(b) Whenever the operating parameters of a directional antenna cannot be maintained within the tolerances specified in paragraph (a), the following procedures will apply:

(1) The licensee shall measure and log every monitoring point at least once for each mode of directional operation. Subsequent variations in operating parameters will require the remeasuring and logging of every monitoring point to assure that the authorized monitoring point limits are not being exceeded.

(2) In the event that any monitoring point exceeds its specified limit, the licensee must either terminate operation within 3 minutes or reduce power in accordance with the applicable provisions of §73.1350(d) in order to eliminate any possibility of interference or excessive radiation in any direction.

(3) Regardless of whether any monitoring point is found to exceed its authorized limit, the licensee must request a Special Temporary Authority (STA) in accordance with §73.1635 to continue operation with parameters at variance and/or with reduced power along with a statement certifying that all monitoring points will be continuously maintained within their specified limits.

(4) The licensee will be permitted 24 hours to accomplish the actions specified in paragraphs (b)(1) and (b)(3) of this section; *provided that*, the date and time of the failure to maintain proper operating parameters has been recorded in the station log.

(c) In any other situation in which it might reasonably be anticipated that the operating parameters might vary out of tolerance (such as planned array repairs or adjustment and proofing procedures), the licensee shall, *before such activity is undertaken*, obtain an STA in accordance with §73.1635 in order to operate with parameters at variance and/or with reduced power as required to maintain all monitoring points within their specified limits.

5. Section 73.69 would be amended by revising paragraphs (a)(1) and (a)(2) to read as follows:

§73.69 Antenna monitors.

(a) ***

(1) Normally, the antenna monitor is to be installed immediately adjacent to the transmitter and antenna phasing equipment. When the phasing equipment is located within the antenna field at a distance from the transmitter, the monitor may be located with the phasing equipment in suitable housing such that the temperature variation is maintained at all times within those limits under which the monitor was type approved.

(2) The antenna monitor installed at a station operating a directional antenna by remote control or when the monitor is installed in the antenna field at a distance from the transmitter, must be designed and authorized for such use in accordance with the provisions of §73.53(b)(9).

* * * * *

6. Section 73.158 would be amended by adding a new paragraph (c) to read as follows:

§73.158 Directional antenna monitoring points.

* * * * *

(c) In the event that any monitoring point is found to exceed its specified limit, the licensee must either terminate operation within three minutes or reduce power in accordance with the applicable provisions of §73.1350(d) in order to eliminate any possibility of interference or excessive radiation in any direction.

7. Section 73.691 would be revised to read as follows:

§73.691 Visual modulation monitoring.

(a) Each TV station must have measuring equipment for determining that the transmitted visual signal conforms to the provisions of this subpart. The licensee shall decide the monitoring and measurement methods or procedures for indicating and controlling the visual signal.

(b) In the event technical problems make it impossible to operate in accordance with the timing and carrier level tolerance requirements of paragraphs (a)(9)(i), (a)(9)(ii), (a)(12), (a)(13), and (a)(17) of §73.682, a TV broadcast station may operate at variance for a period of not more than 30 days without specific authority from the FCC; *provided that*, the date and time of the initial out-of-tolerance condition has been entered in the station log. If the operation at variance will exceed 10 consecutive days, a notification must be sent to the FCC in Washington, D.C., not later than the 10th day of such operation. In the event normal operation is resumed prior to the end of the 30 day period, the licensee must notify the FCC upon restoration of normal operation. If causes beyond the control of the licensee prevent restoration of normal operation within 30 days, a written request must be made to the FCC in Washington, D.C., no later than the 30th day for such additional time as may be necessary.

8. Section 73.757 would be revised by removing and reserving paragraph (b).

9. Section 73.764 would be removed.

10. Section 73.1010 would be revised by removing and reserving paragraph (c).

11. Section 73.1230 would be revised to read as follows:

§73.1230 Posting of station license.

(a) The station license and any other instrument of station authorization shall be posted in a conspicuous place and in such a manner that all terms are visible at the place the licensee considers to be the principal control point of the transmitter.

(b) Posting of the station license and any other instruments of authorization shall be done by affixing them to the wall at the posting location, or by enclosing them in a binder or folder which is retained at the posting location so that the documents will be readily available and easily accessible.

12. A new Section 73.1300 would be added to read as follows:

§73.1300 Unattended station operation.

Broadcast stations may be operated as either attended (where a designated person is responsible for the proper operation of the station either at the transmitter site, a remote control point or an ATS control point) or unattended (where automated monitoring of station operating parameters is employed). No prior FCC approval is required to operate a station in the unattended mode. However, three days prior to initiating such operation, the licensee must notify the Commission by ordinary mail of its intention.

13. A new Section 73.1350 would be added to read as follows:

§73.1350 Transmission system operation.

(a) Each licensee is responsible for maintaining and operating its broadcast station in a manner which complies with the technical rules set forth elsewhere in this Part and in accordance with the terms of the station authorization.

(b) The licensee must designate a chief operator in accordance with §73.1870. The licensee may designate one or more technically competent persons to adjust the transmitter operating parameters for compliance with the technical rules and the station authorization.

(1) Persons so authorized by the licensee may make such adjustments directly at the transmitter site or by using control equipment at an off-site location.

(2) The transmitter control personnel must have the capability to turn the transmitter off at all times. If the personnel are at a remote location, the control system must provide this capability continuously or must include an alternate method of acquiring control that can satisfy the requirement of paragraph (d) of this section that operation be terminated within 3 minutes.

(c) The licensee must establish monitoring procedures and schedules for the station and the indicating instruments employed must comply with §73.1215.

(1) Monitoring procedures and schedules must enable the licensee to determine compliance with §73.1560 regarding operating power and AM station mode of operation, §73.1570 regarding modulation levels, and, where applicable, §73.1213 regarding antenna tower lighting, and §73.69 regarding the parameters of an AM directional antenna system.

(2) Monitoring equipment must be periodically calibrated so as to provide reliable indications of transmitter operating parameters with a known degree of accuracy. Errors inherent in monitoring equipment and the calibration procedure must be taken into account when adjusting operating parameters to ensure that the limits imposed by the technical rules and the station authorization are not exceeded.

(d) In the event that a broadcast station is operating in a manner that is not in compliance with the technical rules set forth elsewhere in this Part or the terms of the station authorization, and the condition is not listed in paragraph (e) of this section, broadcast operation must be terminated within three minutes.

(1) Examples of conditions that require termination of operation include excessive power or excessive modulation.

(2) Additional examples for AM stations are any mode of operation not specified by the station license for the pertinent time of day or hours of operation and any condition of antenna parameters or monitoring points out of the tolerances specified elsewhere in this Part or by the station's instrument of authorization. For these conditions, operation must be terminated within three minutes unless antenna input power is reduced sufficiently to eliminate any excess radiation.

(3) For AM stations using directional arrays, additional procedures apply when array operating parameters are at variance, monitoring points exceed specified limits, or authorized directional mode capability is lost. See §§73.62, Directional antenna system tolerances; 73.158, Directional antenna monitoring points; and 73.1680(b), Emergency antennas.

(e) If a broadcast station is operating in a manner that is not in compliance with one of the following technical rules, operation may continue if the station complies with relevant alternative provisions in the specified rule section.

(1) AM directional antenna system tolerances, *see* §73.62;

(2) AM directional antenna monitoring points, *see* §73.158;

(3) TV visual waveform, *see* §73.691(b).

(4) Reduced power operation, *see* §73.1560(d);

(5) Reduced modulation level, *see* §73.1570(a);

(6) Emergency antennas, *see* §73.1680.

(f) The transmission system must be maintained and inspected in accordance with §73.1580.

(g) Whenever a transmission system control point is established at a location other than at the main studio or transmitter, notification of that location must be sent to the FCC in Washington, D.C. within 3 days of the initial use of that point. This notification is not required if responsible station personnel can be contacted at the transmitter or studio site during hours of operation.

(h) The licensee must ensure that the station is operated in compliance with Part 11, the rules governing the Emergency Alert System (EAS).

14. Section 73.1400 would be revised to read as follows:

§73.1400 Transmission system monitoring and control.

The licensee of an AM, FM or TV station is responsible for assuring that at all times the station operates within tolerances specified by applicable technical rules contained in this Part and in accordance with the terms of the station authorization. Any method of monitoring and adjusting a station's technical operating parameters is permissible. The following are typical methods of transmission system monitoring and control:

(a) *Attended Operation:* Attended operation consists of ongoing supervision of the transmission facilities by a station employee or other person designated by the licensee. Such supervision may be accomplished by either:

(1) Direct supervision and control of transmission system parameters by a person at the transmitter site; or,

(2) Remote control of the transmission system by a person at the main studio or other location. The remote control system must provide sufficient transmission system monitoring and control capability so as to ensure compliance with §73.1350. However, not every station parameter need be monitored or controlled if the licensee has good reason to believe that its stability is so great that its monitoring and control are unnecessary. If a malfunction causes loss of monitoring data, our proposed rule would permit a station to continue to operate for a period not exceeding three hours from the time such loss is discovered, provided that the operator can determine by other means that the station is operating in compliance with our technical rules.

(3) A station may also be monitored and controlled by an automatic transmission system (ATS) that is configured to contact a person designated by the licensee in the event of a technical malfunction. An automatic transmission system consists of monitoring devices, control and alarm circuitry, arranged so that they interact automatically to operate the station's transmitter and maintain technical parameters within licensed values.

(4) A hybrid system containing some remote control and some ATS features is also permissible.

(b) *Unattended operation:* Unattended operation is the substitution of automated supervision of a station's transmission system for human supervision. It consists of the use of a self-monitoring or ATS-monitored and controlled transmission system that, in lieu of contacting a person

designated by the licensee, automatically takes the station off the air within three minutes of any technical malfunction which is capable of causing interference.

15. Sections 73.1410, 73.1500 and 73.1550 would be removed.

16. Section 73.1570 would be amended by revising paragraph (a) to read as follows:

§73.1570 Modulation levels: AM, FM, and TV aural.

(a) The percentage of modulation is to be maintained at as high a level as is consistent with good quality of transmission and good broadcast service, with maximum levels not to exceed the values specified in paragraph (b). Generally, the modulation should not be less than 85% on peaks of frequent recurrence, but where lower modulation levels may be required to avoid objectionable loudness or to maintain the dynamic range of the program material, the degree of modulation may be reduced to whatever level is necessary for this purpose, even though under such circumstances, the level may be substantially less than that which produces peaks of frequent recurrence at a level of 85%. In the event technical problems make it impossible to maintain the minimum modulation level, a broadcast station may operate at variance without specific authority from the FCC. If the reduced modulation due to technical problems will exceed 10 consecutive days, a notification must be sent to the FCC in Washington, D.C., not later than the 10th day of such operation. The licensee must notify the FCC upon restoration of normal operation. If normal operation cannot be restored within 90 days, an additional notification must be sent to the FCC in Washington, D.C., no later than the 90th day. Thereafter, additional notifications must be sent every 90 days until normal operation is resumed.

* * * * *

17. Section 73.1580 would be revised to read as follows:

§73.1580 Transmission system inspections.

(a) Each AM, FM, and TV station licensee or permittee must conduct periodic complete inspections of the transmitting system and all required monitors to ensure proper station operation.

(b) The Commission may require the licensee to produce a record of transmitting system measurement, adjustment and preventive maintenance procedures and schedules.

18. Section 73.1635 would be amended by revising paragraph (a)(5) to read as follows:

§73.1635 Special temporary authorizations (STA).

(a) ***

(5) Certain rules specify special considerations and procedures in situations requiring an STA or permit temporary operation at variance without prior authorization from the FCC when notification is filed as prescribed in the particular rules. See §73.62, Directional antenna system tolerances; §73.157, Antenna testing during daytime; §73.158, Directional antenna monitoring points; §73.691, Visual modulation monitoring; §73.1250, Broadcasting emergency information; §73.1350, Transmission system operation; §73.1560, Operating power and mode tolerances; §73.1570, Modulation levels: AM, FM, and TV aural; §73.1615, Operation during modification of facilities; §73.1680, Emergency antennas; and §73.1740, Minimum operating schedule.

* * * * *

19. Section 73.1820 would be amended by revising paragraphs (a) and (a)(2)(iii), by removing paragraphs (b)(4), (b)(5) and (b)(6), by removing the first sentence of paragraph (b)(7) and redesignating paragraph (b)(7) as paragraph (b)(4), and by redesignating paragraph (b)(8) as paragraph (b)(5) to read as follows:

§73.1820 Station log.

(a) Entries must be made in the station log either manually by a person designated by the licensee who is in actual charge of the transmitting apparatus, or by automatic devices meeting the requirements of paragraph (b) of this section. Indications of operating parameters that are required to be logged must be logged prior to any adjustment of the equipment. Where adjustments are made to restore parameters to their proper operating values, the corrected indications must be logged and accompanied, if any parameter deviation was beyond a prescribed tolerance, by a notation describing the nature of the corrective action. Indications of all parameters whose values are affected by the modulation of the carrier must be read without modulation. The actual time of observation must be included in each log entry. The following information must be entered:

* * * * *

(2) ***

(iii) Entries of the results of calibration of automatic logging devices (see paragraph (b) of this section) or indicating instruments (see §73.67), whenever performed.

* * * * *

(b) ***

(4) In the event of failure or malfunctioning of the automatic equipment, the person designated by the licensee as being responsible for the log shall make the required entries in the log manually at that time.

(5) The indicating equipment conforms to the requirements of §73.1215 (Indicating instruments -- specifications) except that the scales need not exceed 5 cm (2 inches) in length. Arbitrary scales may not be used.

* * * * *

20. Section 73.1860 would be removed.

21. Section 73.1870 would be amended by revising paragraphs (a) and (b)(3) to read as follows:

§73.1870 Chief operators.

(a) The licensee of each AM, FM, or TV broadcast station must designate a person to serve as the station's chief operator. At times when the chief operator is unavail-

able or unable to act (*e.g.*, vacations, sickness), the licensee shall designate another person as the acting chief operator on a temporary basis.

(b) ***

(3) The designation of the chief operator must be in writing with a copy of the designation posted with the station license. Agreements with chief operators serving on a contract basis must be in writing with a copy kept in the station files.

* * * * *

22. The authority citation for Part 74 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303, 554.

23. Section 74.5 would be amended by removing and reserving paragraph (c).

24. Section 74.18 would be revised to read as follows:

§74.18 Transmitter control and operation.

Except where unattended operation is specifically permitted, the licensee of each station authorized under the provisions of this part shall designate a person or persons to activate and control its transmitter. At the discretion of the station licensee, persons so designated may be employed for other duties and for operation of other transmitting stations if such other duties will not interfere with the proper operation of the station transmission systems.

25. Section 74.165 would be revised to read as follows:

§74.165 Posting of station license.

The instrument of authorization or a clearly legible photocopy thereof shall be available at the transmitter site.

26. Section 74.432 would be amended by revising paragraph (e)(1) to read as follows:

§74.432 Licensing requirements and procedures.

* * * * *

(e) ***

(1) The station must be designed, installed, and protected so that the transmitter can only be activated or controlled by persons authorized by the licensee.

* * * * *

27. Section 74.434 would be amended by revising paragraph (b) to read as follows:

§74.434 Remote control operation.

* * * * *

(b) A remote control system must be designed, installed, and protected so that the transmitter can only be activated or controlled by persons authorized by the licensee.

* * * * *

28. Section 74.436 would be amended by revising paragraph (a) to read as follows:

§74.436 Special requirements for automatic relay stations.

(a) An automatic relay station must be designed, installed, and protected so that the transmitter can only be activated or controlled by persons authorized by the licensee.

* * * * *

29. Section 74.533 would be amended by revising paragraph (a)(2) to read as follows:

§74.533 Remote control and unattended operation.

(a) ***

(2) The remote control system must be designed, installed, and protected so that the transmitter can only be activated or controlled by persons authorized by the licensee.

* * * * *

30. Section 74.564 would be amended by revising the heading and paragraph (a) to read as follows:

§74.564 Posting of station license.

(a) The station license and any other instrument of authorization or individual order concerning the construction of the equipment or manner of operation of the station shall be posted in the room in which the transmitter is located, provided that if the station is operated by remote control pursuant to §74.533, the station license shall be posted at the operating position.

31. Section 74.634 would be amended by revising paragraph (a)(1) to read as follows:

§74.634 Remote control operation.

(a) ***

(1) The remote control system must be designed, installed, and protected so that the transmitter can only be activated or controlled by persons authorized by the licensee.

* * * * *

32. Section 74.703 would be amended by revising paragraph (c) to read as follows:

§74.703 Interference.

* * * * *

(c) It shall be the responsibility of the licensee of a low power TV, TV translator, or TV booster station to correct any condition of interference which results from the radiation of radio frequency energy outside its assigned channel. Upon notice by the Commission to the station licensee that such interference is caused by spurious emissions of the station, operation of the station shall be immediately suspended and not resumed until the interference has been eliminated. However, short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures.

* * * * *

33. Section 74.734 would be amended by revising paragraph (a) and removing paragraph (a)(6) to read as follows:

§74.734 Attended and Unattended operation.

(a) Low power TV, TV translator, and TV booster stations may be operated without a designated person in attendance if the following requirements are met:

* * * * *

34. Section 74.750 would be amended by revising paragraph (g) to read as follows:

§74.750 Transmission system facilities.

* * * * *

(g) Low power TV, TV translator, or TV booster stations installing new type accepted transmitting apparatus incorporating modulating equipment need not make equipment performance measurements and shall so indicate on the station license application. Stations adding new or replacing modulating equipment in existing low power TV, TV translator, or TV booster station transmitting apparatus must have a qualified person examine the transmitting system after installation. This person must certify in the application for the station license that the transmitting equipment meets the requirements of paragraph (d)(1) of this section. A report of the methods, measurements, and results must be kept in the station records. However, stations installing modulating equipment solely for the limited local origination of signals permitted by §74.731 need not comply with the requirements of this paragraph.

35. Section 74.765 would be amended by removing paragraph (b) and redesignating paragraph (c) as paragraph (b).

36. Section 74.769 would be revised to read as follows:

§74.769 Copies of rules.

The licensee or permittee of a station authorized under this subpart shall have a current copy of Volume I and Volume III of the Commission's Rules. Each such licensee or permittee shall be familiar with those rules relating to stations authorized under this subpart. Copies of the Commission's rules may be obtained from the Superintendent of Documents, Government Printing Office, Washington, DC 20402.

37. Section 74.901 would be amended by revising the definitions for attended operation, remote control and unattended operation to read as follows:

§74.901 Definitions.

Attended operation. Operation of a station by a designated person located at the transmitting apparatus with the transmitter in plain view.

* * * * *

Remote control. Operation of a station by a designated person at a location from which the transmitter is not visible but where suitable control and telemetering circuits allow the performance of the essential functions that could be performed at the transmitter.

* * * * *

Unattended operation. Operation of a station by automatic means whereby the transmitter is turned on and off and performs its functions without a person being present.

38. Section 74.939 would be amended by revising paragraph (i) to read as follows:

§74.939 Special rules governing ITFS response stations.

* * * * *

(i) The transmitter of an ITFS response station may be operated unattended provided that the transmissions are observed by a person at the associated instructional television fixed station designated by the licensee of that station, who shall take such steps as may be necessary to correct any condition of improper operation. The overall performance of the ITFS response station transmitter shall be checked as often as necessary to ensure that it is functioning in accordance with the requirements of the Commission's rules. The licensee of an ITFS response station is responsible for the proper operation of the transmitter at all times. The transmitter shall be installed and protected in such manner as to prevent tampering or operation by unauthorized persons.

39. Section 74.969 would be revised to read as follows:

§74.969 Copies of rules.

The licensee of an instructional television fixed station shall have a current copy of parts 73 and 74 of the Commission's Rules. In cases where aeronautical hazard marking of antennas is required, such licensee shall also have a current copy of part 17 of this chapter. Each licensee is expected to be familiar with the pertinent rules governing instructional television fixed stations.

40. Section 74.1203 would be amended by revising paragraph (e) to read as follows:

§74.1203 Interference.

* * * * *

(e) It shall be the responsibility of the licensee of an FM translator or FM booster station to correct any condition of interference which results from the radiation of radio frequency energy by its equipment on any frequency outside the assigned channel. Upon notice by the Commission to the station licensee that such interference is being caused, the operation of the FM translator or FM booster station shall be immediately suspended and shall not be resumed until the interference has been eliminated or it can be demonstrated that the interference is not due to spurious emissions by the FM translator or FM booster station; *provided, however,* that short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures.

41. Section 74.1234 would be amended by revising paragraph (a) and removing paragraph (c) to read as follows:

§74.1234 Unattended operation.

(a) A station authorized under this subpart may be operated without a designated person in attendance if the following requirements are met:

APPENDIX B

Initial Regulatory Flexibility Act Analysis

I. Reason for Action

A revision in the Communications Act of 1934 has given the Commission authority to waive the requirement that broadcast stations be operated by licensed transmitter duty operators. A waiver of this requirement would permit such stations to be operated unattended for the first time. This proceeding explores the feasibility of such operation. In connection with the proposed changes in transmitter monitoring and control policy and in response to numerous inquiries that topic, a number of other rules need updating.

II. Objectives

The proposed action is intended to update the rules to provide for unattended broadcast station operation and to clarify the technical responsibilities of broadcast licensees, particularly those operating unattended stations.

III. Legal Basis

The action taken by this *Notice* is authorized by Sections 4(i) and (j), 302, 303 and 403 of the Communications Act of 1934, as amended.

IV. Description, Potential Impact and Number of Small Entities Affected

The action proposed in this proceeding is expected to benefit smaller broadcast licensees by eliminating the need for a transmitter duty operator. This is expected to result in an operational cost savings. However, taking advantage of the flexibility provided by the proposed new rules is entirely optional. Licensees may continue to operate as they currently do if they so desire.

V. Recording, Record Keeping and Other Compliance Requirements

None.

VI. Federal Rules which Overlap, Duplicate or Conflict with this Rule

None.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objectives

None.

Before the
Federal Communications Commission
Washington, D.C. 20554

Amendment of Part 2 of the
Commission's Rules to delete
Footnote US243 and make
editorial corrections to the Table
of Frequency Allocations.

ORDER

Adopted: January 4, 1995; Released: January 9, 1995

By the Office of Engineering and Technology:

1. This Order amends and clarifies the Table of Frequency Allocations, Section 2.106 of the Commission's Rules by removing an obsolete United States footnote and correcting printing errors from previous Commission decisions. Specifically, we are deleting footnote US243. We are correcting the presentation of the land mobile allocation in the 220-222 MHz band, the amateur allocation in the 222-225 MHz band, and the text of International footnote 471.

2. Footnote US243 provides stations in the radiolocation service priority use of the 220-225 MHz band over other services until January 1, 1990. This date has passed, making the footnote obsolete. Therefore, to update our rules, we are deleting footnote US243 from the Table of Frequency Allocations.

3. The Commission allocated the 220-222 MHz band to the land mobile service on a primary basis and the 222-225 MHz band to the amateur service on a primary basis in GEN Docket No. 87-14.[1] However, these allocations were printed incorrectly in the Code of Federal Regulations as secondary services. Therefore, we are correcting the Table of Frequency Allocations, Section 2.106, to correctly show the primary status of these allocations.

4. The Commission publishes all International Telecommunication Union (ITU) footnotes in the domestic table of frequency allocations for informational purposes. International footnote 471 (RR471) contains specific provisions pertaining to the use of the 490-495 kHz and 505-510 kHz bands. This footnote was adopted domestically in GEN Docket No. 80-739.[2] However, in the printing of RR471 in the Rules, the mention of the 505-510 kHz band was inadvertently omitted. Therefore, we are also correcting the Table of Frequency Allocations to correctly show RR471.

5. This Order makes only minor technical amendments to the rules; no substantive changes have been made to the rules. Notice and comment are therefore unnecessary. *See* 5 U.S.C. § 553(b)(B). Accordingly, IT IS ORDERED, that pursuant to authority of 47 U.S.C. Section 154(i), 302, and 303, and pursuant to Section 0.231(d) of the Commission's Rules. Part 2 of the Commission's Rules and Regulations IS AMENDED as shown below. This amendment becomes EFFECTIVE IMMEDIATELY.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Office of Engineering and Technology

APPENDIX: RULE CHANGES

Part 2 of chapter I of title 47 of the Code of Federal Regulation is amended as follows:

PART 2--FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows:

a. In the 220-222 MHz band: delete US243 from columns 4 and 5; in columns 4 and 5 replace 'Land mobile' with 'LAND MOBILE.'; and in column 6 replace 'Private land mobile (90)' with 'PRIVATE LAND MOBILE (90).'. In the 222-225 MHz band: delete US243 from columns 4 and 5; in column 5 replace 'amateur' with 'AMATEUR.'; and in column 6 replace 'Amateur (97)' with 'AMATEUR (97).'.

[1] *See Report and Order*, GEN Docket No. 87-14, 53 FR 36287, (September 19, 1988).

[2] *See Second Report and Order*, GEN Docket No. 80-739, 49 FR 02357, (January 19, 1984).

§ 2.106 Table of Frequency Allocations

* * * * *

International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
* * * * *						
			220-222 LAND MOBILE. Radiolocation. 627, G2	220-222 LAND MOBILE. 627	PRIVATE LAND MOBILE (90).	
			222-225 Radiolocation. 627, G2	222-225 AMATEUR. 627	AMATEUR (97).	

* * * * *

b. The text of footnote US243 is deleted from the United States footnotes.

c. The text of footnote 471 in the list of International footnotes is revised to read as follows:

INTERNATIONAL FOOTNOTES

* * * * *

471 The bands 490-495 kHz and 505-510 kHz shall be subject to the provisions of No. 3018 until the entry into force of the reduced guardband in accordance with Resolution 210 (Mob-87).

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-316

In re Applications of

RIVERTOWN COMMUNICATIONS COMPANY, INC. — File No. BPH-911008ME

SAMPLE BROADCASTING COMPANY, L.P. — File No. BPH-911010MA

For Construction Permit for a
New FM Station on Channel 282C3,
Eldon, Iowa

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 1994; Released: January 9, 1995

By the Review Board: MARINO (Chairman) and GREENE.

1. The Review Board has before it for consideration a Joint Request for Approval of Settlement Agreement filed November 4, 1994 by Rivertown Communications Company, Inc. and Sample Broadcasting Company, L.P. The Joint Request is accompanied by an Agreement that contemplates grant of Sample's application and dismissal of Rivertown's application in exchange for: (1) assignment to Rivertown of whatever rights Sample may have to a refund from the Commission of Sample's hearing fee; and (2) payment of $19,000 by Sample to Rivertown. On December 21, 1994, Rivertown supplemented the Joint Request with a declaration of counsel documenting the legal expenses it incurred in prosecuting its application. The Mass Media Bureau commented in support on December 22, 1994.

2. Both Sample and Rivertown were found to be basically qualified in *Rivertown Communications Co., Inc.*, 8 FCC Rcd 7928 (ALJ 1993), and the Sample application was selected on the basis of the comparative criteria in the now partially discredited *Policy Statement on Comparative Broadcast Hearings*, 1 FCC Rcd 393 (1965).[1] In reaching this conclusion, the presiding officer below resolved designated strike application and real-party-in-interest issues favorably to Sample. Exceptions filed by Rivertown and Contingent Exceptions filed by Sample, and replies to each, have continued in pending status pursuant to Public Notice, FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055 (1994), and Public Notice, Modification of FCC Comparative Proceedings Freeze Policy, FCC 94-204 (Aug. 4, 1994), issued in light of *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (integration criteria applied to mutually exclusive broadcast applicants are arbitrary and capricious and unlawful).

3. The Joint Request fully complies with the provisions of 47 U.S.C. § 311(c) and 47 C.F.R. § 73.3525 that govern settlement agreements. Both parties have stated under penalty of perjury that there is no other consideration for dismissal of Rivertown's application other than the contemplated payment of Rivertown's expenses, they did not file their applications for the purpose of entering into a settlement agreement, and approval of the agreement will permit the early establishment of a first radio service in Eldon. Rivertown has further stated under penalty of perjury that the proposed payment is less than its legitimate and prudent expenses in prosecuting its application, and it has submitted supportive documentation showing that its expenses exceed the proposed $19,000 expense reimbursement. In addition, any payment Riverside might receive pursuant to the assignment of Sample's possible right to a hearing fee refund would not exceed Riverside's documented expenses, even when added to the proposed expense reimbursement.

4. In its pre-settlement exceptions, Rivertown attacked the ALJ's conclusion that Sample is basically qualified under the real-party-in-interest issue. We have reviewed these exceptions and find no basis therein to disturb the ALJ's conclusion that Sample's principal "will be in complete overall control of the Eldon station." *ID* at ¶ 95. At the time Sample's sole general partner, Carmela Sample-Day, applied for the station, she was news director at KKSI(FM), Eddyville, Iowa, which was licensed to O-Town Communications, Inc. The ALJ found that a minority owner of O-Town, Mark McVey, who was also its chief engineer, had looked into an Eldon station as a good business opportunity for O-Town and had also considered some programming arrangement between KKSI and an Eldon station. Bruce Lindner, another O-Town principal, briefly considered pursuing the station but let the matter drop because of the disinterest of his father, also an O-Town principal. In the meantime, Sample-Day asked McVey for advice about pursuing the channel and approached Lindner about joining her in an application. Lindner became the Sample sole limited partner, a passive role that he has maintained throughout. *ID* at ¶ ¶ 29-44. As she prepared her application, Sample-Day solicited and paid for McVey's assistance in selecting her site and evaluating equipment. *Id.* at ¶ ¶ 53-55, 59.

5. The real-party-in-interest issue arose because of statements McVey made to Riverside principal David W. Brown about Lindner control of the Sample applicant. McVey testified at hearing that he was not privy to any conversations or information that would support any statements he may have made to Brown, his statements were not based on any personal knowledge. Mrs. Sample-Day was an enthusiastic applicant, and he was merely expressing his own frustrations with his position at O-Town. *ID* at ¶ ¶ 75-77, 81. The ALJ, who heard the testimony of the witnesses, found McVey's explanation to be credible, particularly since McVey had not known the details of the business relationship between Sample-Day and Lindner and had incorrectly presumed Lindner would be a voting shareholder. *Id.* at ¶ 91. He also found that Sample-Day

[1] *See Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993).

was experienced in broadcasting, was the sole driving force behind the application, and acted independently of Lindner throughout. *Id.* at ¶ ¶ 92-95. Rivertown's exceptions attacked McVey's credibility, alleging that he had showed a propensity to deceive the Commission in an unrelated proceeding, and argued that the record as a whole warrants conclusions adverse to Sample. In light of the deference this Board must give to the credibility findings of the presiding officer, who has observed the testimony of the witnesses first hand, and the substantial evidence supporting these findings, Riverside's exceptions do not establish that Sample is unqualified for a grant pursuant to the settlement agreement. *See Calvary Educational Broadcasting Network, Inc.*, 9 FCC Rcd 6412, 6415-16 ¶17 (Rev. Bd. 1994), citing *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985); *TeleSTAR, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987) (subsequent history omitted). When McVey's testimony is considered along with the testimony of other witnesses to Sample's conduct in pursuing its application, the record as a whole does not require that Sample be found unqualified under this issue.

6. Finally, Sample has filed a Contingent Petition for Leave to Amend and Amendment withdrawing and deleting the integration, divestiture and diversification commitments previously made in this proceeding for comparative advantage. Sample reports that Sample-Day is no longer working at any radio station, which satisfies the divestiture/diversification commitment Sample made when preparing for the comparative hearing. In light of *Bechtel*, the Commission relieved applicants prevailing pursuant to settlement agreements of any obligation to adhere to their integration proposals. FCC Freezes Comparative Proceedings, 9 FCC Rcd 1055. Thus, Sample's amendment is consistent with Commission policy and will be accepted.

7. ACCORDINGLY, IT IS ORDERED That the Joint Request for Approval of Settlement Agreement, filed November 4, 1994 by Sample Broadcasting Company, L.P. and Rivertown Communications Company, Inc., as supplemented December 21, 1994, IS GRANTED, and the attached Agreement IS APPROVED; that the Contingent Petition for Leave to Amend filed November 21, 1994 by Sample Broadcasting Company, L.P. IS GRANTED and the amendment IS ACCEPTED; that the Petitions for Leave to Amend filed April 4 and September 30, 1994 by Rivertown Communications Company, Inc. ARE DISMISSED as moot; that the Exceptions of Rivertown Communications Company, Inc. and the Contingent Exceptions of Sample Broadcasting Company, L.P. filed December 10, 1993 ARE DISMISSED; that the application of Rivertown Communications Company, Inc. (File No. BPH-911008ME) IS DISMISSED; that the application of Sample Broadcasting Company, L.P. (File No. BPH-911010MA), as amended, IS GRANTED; and that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	File No. C294-PP0003-HS
Horizon Cable TV, Inc.	West Marin, CA1090
Petition For	Stinson Beach, CA1455
Hardship Rate Relief	

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 13, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. Horizon Cable TV, Inc. (Horizon) has filed a petition for hardship rate relief relating to cable television systems in West Marin and Stinson Beach, California, pursuant to the guidelines established in the Commission's *Cost Order*.[1] Horizon filed supplemental materials, and several parties filed comments. After a careful review of the record, we have determined that Horizon is justified in implementing its proposed rate increase. Accordingly, in this Order, we grant Horizon's request that it be allowed to raise its rates.

2. On May 3, 1993, the Commission released its *Rate Order* establishing rules to implement the cable television rate regulation provisions of the 1992 Cable Act.[2] In the *Rate Order*, the Commission determined that a benchmark approach, designed to approximate the rates a cable operator would serve in a competitive market, should serve as the primary method for regulating basic service and CPS rates. The Commission also concluded that because the benchmark methodology might not produce fully compensatory rates in all cases, it was appropriate to permit operators, as an alternative, to justify rates based on costs, using individual cost of service showings.[3]

3. The cost of service approach was intended to be used only if an operator believed that the maximum rate permitted under the benchmark formula would not enable the operator to recover costs reasonably incurred in providing rate regulated cable services. On July 16, 1993, the Commission issued a Notice of Proposed Rulemaking which proposed requirements to govern cost of service showings submitted by cable operators seeking to justify rates higher than those determined under the benchmark approach.[4] In February 1994, the Commission adopted the *Cost Order*, setting forth specific regulatory requirements to govern cost of service filings to justify rates above levels determined under its benchmark requirements. The new rules apply to rates charged or to be charged after May 15, 1994.

4. In the *Cost Order*, the Commission also made available hardship rate relief for an operator that concludes that the benchmark/cost-of-service regulations threaten its financial health or ability to provide cable service.[5] We later clarified that such relief does not require a showing that foreclosure or bankruptcy proceedings have been or would be imminently initiated, and continued cable service need not be in jeopardy.[6] We also stated that an important factor in assessing any hardship showing will be the operator's ability to meet costs, including costs associated with capital improvement and debt service. Recognizing that operators in hardship may experience difficulty in assembling documentation to make a hardship showing, we concluded that they could rely on existing data rather than expending resources on obtaining an independent analysis of their financial situation.[7]

II. BACKGROUND

5. Horizon filed its petition on October 18, 1994. According to the petition, Horizon operates six systems, serving a total of 2,269 subscribers, in communities in Marin County, California. It provides a basic service tier and four pay channels in each system. It does not offer a cable programming service tier. In June 1991, Horizon obtained a $1,425,575 bank loan to finance the acquisition of these systems and to fund capital improvements for them. It also planned to use a portion of the funds to build a new system in northwestern Marin County.[8] Horizon states that from June 1991 to April 1993 it embarked on its capital improvement plan. It constructed three line extensions totaling 10.5 miles of additional cable plant to make service available to approximately 400 homes. It also rebuilt four miles of cable plant to improve signal quality. Additionally, it added 11 channels to one system and eight channels to another. Horizon states that three of its systems have not experienced a rate increase since June 1991 and its fourth system has not had a rate increase since October 1992. Currently, subscribers in these systems pay an average rate of $18.50 per month for basic service. Horizon seeks to raise rates in two of these communities.[9]

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[1] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 93-215, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 4527 (1994) (*Cost Order*).

[2] Implementation of Sections of the Cable Television Consumer Protection Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) (*Rate Order*); *see also* Communications Act of 1934, as amended, 47 U.S.C. §543(i).

[3] *Rate Order*, 8 FCC Rcd at 5794-95; *see also*, 47 C.F.R. §76.922.

[4] Implementation of Sections of the Cable Television Consumer Protection Act of 1992: Rate Regulation, MM Docket No. 93-215, Notice of Proposed Rulemaking, FCC 93-353 (released July 16, 1993), 58 Fed. Reg. 40762 (July 30, 1993) (*Notice*).

[5] *See* Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-215, 9 FCC Rcd 4527 (1994) (*Cost Order*) at 4676-77.

[6] *See Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking*, MM Docket Nos. 93-215 and 92-266, FCC 94-234, summarized at 59 Fed. Reg. 17975 (Apr. 15, 1994).

[7] *Id.*

[8] Horizon states that it did not build this system.

[9] Letter from David D. Kinley, attorney for Horizon, to Secretary, FCC, Dec. 5, 1994. Horizon clarified that it was requesting rate relief only for its Stinson Beach and West Marin systems.

6. Horizon's basic service tier is subject to regulation by Marin County. Horizon states that it filed FCC Forms 1200 and 1205 with Marin County on September 1, 1994; it then notified Marin County that it was electing to file a cost-of-service showing. However, Horizon did not file the cost-of-service showing because it states it is unable to afford professional assistance to complete the requisite form. According to its petition, Horizon has been operating with a monthly cash shortfall, after payment of operating expenses and debt service, since June 1993; its cumulative cash flow deficit reached $94,819 on July 31, 1994. In an attempt to remedy the situation, Horizon states it has reduced the number of staff and imposed salary cuts. It also took some equipment out of service. Horizon states that although these measures reduced expenses by a total of $49,304 as of July 31, 1994, it continues to experience a cash shortfall of approximately $8,000 per month.

7. According to the petition, Horizon's principal loan balance!is due December 15, 1994. Horizon attaches to its petition a cash flow summary purporting to demonstrate its inability to meet costs associated with capital improvements and debt service. Horizon states that it has not yet defaulted on any interest or principal payments, but it is not in compliance with certain loan covenants, including ratio of cash flow to debt service; maintenance of profitability on a rolling three-month basis; and a limit on the amount of quarterly or year-end loss. Horizon states that it must be allowed to increase its rates before its lender will consider refinancing its debt. It requests permission to raise its rates by up to $6.50 which would set its maximum rate for monthly basic tier service within a range of $20.50 to $26.92.

III. COMMENTS

8. On November 7, 1994, the Commission placed Horizon's petition on public notice. In comments, the U.S. Small Business Administration's Office of Advocacy (SBA) supports Horizon's petition and expresses concern with the Commission's review, stating that the amount of information requested by Commission staff was excessive and would lead to a time-consuming hardship review process. The Small Cable Business Association (SCBA) urges the Commission to avoid requesting information that small systems may be required, or may at least prefer, to keep confidential. Additionally, SCBA states that the Commission, and not local franchising authorities, should review small system/small operator hardship petitions even where the system provides only a basic service tier, because "expeditious resolution would not result if the local franchising authority were required to adjudicate the matter."[10] Gary Giacomini, Chair of the Marin County Board of Supervisors, states that Horizon's proposed increase is reasonable in view of the number of channels it provides. Mr. Giacomini also notes that, even with the proposed increase, Horizon's rates would still be comparable to those of other cable operators providing service in Marin County.

IV. DISCUSSION

A. Jurisdiction

9. Although our rules contemplate that local franchising authorities will review hardship rate petitions for the basic service tier, we agree that the Commission may review such petitions when filed by small systems/small operators,[11] even where such systems provide only a basic service tier. Congress has directed the Commission to "reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers."[12] This mandate justifies our review of small system/small operator hardship rate petitions in several ways: a small system/small operator that deals with multiple local franchising authorities will be spared the expense of having to file multiple hardship rate petitions; by petitioning the Commission directly, a small system/small operator will not have to incur additional expenses related to any appeal of a local franchising authority decision; and, since time may be of the essence in a hardship proceeding, Commission review will speed resolution of the matter.

B. Analysis of Showing

10. Horizon claims that the requested rate increase is necessary for the system to meet its debt service obligations and restore service levels which have been reduced by emergency operating expense reductions. In supplementing its original filing, at staff request, Horizon has provided its loan agreements and loan terms, monthly financials (including income statements), general ledger trial balances (including starting balances, adjusting entries, and ending balances), and information on cash flow, ownership, and taxes. In providing the staff with this already existing information, Horizon has enabled us to conclude that it does require rate increases in order to regain and maintain financial integrity, and that it can justify such increases on a cost of service basis. Our analysis reveals that Horizon's difficulties lie in two principal areas, its capital structure and capital expenditure planning.

11. As noted in the petition, the initial principal amount of the loan from Silicon Valley Bank was $1,390,500, funded under three notes in amounts of $1,030,000, $164,500, and $196,000. The first note was used to purchase the systems in West Marin and Stinson Beach while the other notes were used to fund capital expenditures which extended plant and added channels to the West Marin and Stinson Beach systems. Due to Horizon's inability to meet its debt service obligations, the three notes were consolidated in 1993, and the loans were completely restructured with a 13 month tenor, new financial covenants, and an increased interest rate of Prime plus 3%.[13] The fees charged and interest rate required are not unusual in special asset restructurings.

12. Horizon is now again in default of the financial covenants in its loan agreement. While not quite as serious as a payment default, a financial covenant default is taken

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[10] SCBA Comments at 4.

[11] A small system is one which serves 1,000 or fewer subscribers from the principal headend. 47 C.F.R. § 76.901(c). A small multiple system operator is one serving 250,000 or fewer total subscribers that owns only systems with less than 10,000 subscribers each and has an average system size of 1,000 or fewer subscribers. 47 C.F.R. § 76.922(b)(5)(i). A small operator is one with a total of 15,000 or fewer subscribers that is not affiliated with a larger company (i.e., the larger company may not hold more than a 20-percent equity interest in the small operator). 47 C.F.R. § 76.922(b)(4)(i)(A).

[12] Communications Act of 1934, as amended, § 623(i), 47 U.S.C. § 543(i).

[13] This was apparently the work of Silicon Valley Bank's

seriously by the financial institutions and can often result in the institution internally declaring an "out" strategy with a borrower. This would mean that the institution's principal objectives are (a) to be repaid in full of all principal and interest, if possible, and (b) to encourage the borrower to find other long term financing sources.

13. Our review of Horizon's showing persuades us that its difficulties arise not from an unreasonably high purchase price for this system, but from characteristics endemic to the system and service areas. For example, Horizon is incurring costs beyond those of a typical cable company by providing cable service to rural residents that the "previous large" operator would not. Horizon's representation that it may not have its loans renewed appears valid. The availability of financing alternatives is also questionable. Nevertheless, given that operating expenses have already been addressed by Horizon (resulting, Horizon states, in a disruption of service quality), it appears that a rate increase will be necessary to meet Horizon's ongoing cash flow needs.

14. *Cost of Service Review:* Horizon's rate increase justification, as amplified at staff request, constitutes a rather complete picture of Horizon's financial situation and of the costs related to its provision of regulated cable service. Horizon's supplementation has enabled us to prepare an informal small-system cost of service justification, using FCC Form 1225. We were able to identify and allocate investments and expenses related to the two areas in question, Stinson Beach and West Marin, and to compute a revenue requirement for basic service based on the cost elements identified and associated with the two communities. Horizon's information also allowed us to calculate total revenue and income adjustments, and total revenue requirement, for the company. A review of Horizon's cost of service, based on the information Horizon has provided, justifies the basic service rate Horizon proposes. We have calculated Horizon's justifiable rate using a rate of return of 11.25%, and have included federal and state taxes.

C. Burden

15. With respect to the commenters' criticism regarding the additional information requested, we believe the process employed was justified. The information initially offered by Horizon, consisting of a one-page chart summarizing periodic cash flow, provided only general data that could not be substantiated, and that was in any case inadequate to support an analysis. Bureau staff requested that Horizon provide only information or documentation that was already in existence. The company was never asked to provide information not already in existence. Bureau staff confirmed the existence of the information requested with Horizon's counsel and offered to review alternative data if it would be less burdensome to Horizon; we are very reluctant to impose burdens on small operators, but must secure information adequate to perform a meaningful review. Horizon's initial showing failed to justify the extraordinary relief it seeks. Therefore, it was necessary to request additional data to verify the information contained in the petition.[14]

16. We found that it was possible, using existing information, to create for Horizon streamlined cost of service showing that Horizon, as a small operator, is entitled to use. It is based on this showing, and the concomitant cost of service analysis, that we are finding Horizon's proposed rate increase justified. We note, however, that, since Horizon's proposed rate increase can be substantiated on the basis of our cost of service rules, Horizon should have prepared the FCC Form 1225 and submitted it to the local franchising authority, rather than petitioning this Commission for hardship rate relief. Because the Horizon case was a case of first impression and because of the serious time constraints involved, we have agreed to consider this petition and showing, and we have converted Horizon's information into an informal cost of service filing. However, we do not plan to grant hardship relief in the future when the rates required could have been justified under a cost of service showing. In this regard, we note that the Bureau has set up a small system hotline that small operators can use to obtain assistance in completing filings. We note also that the FCC Form 1225, the streamlined cost of service filing, is very abbreviated; Horizon's existing information was sufficient to complete this filing.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to the authority delegated in Section 0.321 of the Commission's rules, 47 C.F.R. §0.321, that Horizon Cable TV, Inc. HAS JUSTIFIED its proposed increase of $6.50 in its basic cable service rate, based on a cost of service analysis of data provided in Horizon's hardship rate relief filing.

18. IT IS FURTHER ORDERED, pursuant to Section 76.922 of the Commission's rules, 47 C.F.R. §76.922, that the petition of Horizon Cable TV, Inc. for hardship rate relief IS GRANTED to the extent that its cost of service showing justifies the requested rate increase, AND IS OTHERWISE DENIED.

19. IT IS FURTHER ORDERED that all future rate changes for Horizon Cable TV, Inc. shall be subject to the approval of the Marin County local franchising authority, in accordance with usual procedures as described in the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

special assets (or workout) division. Horizon states that it has been unable to comply with the revised amortization schedules as well as the interest rate of Prime plus 3%.

[14] SCBA raises the issue of confidentiality. Although Horizon did not request that its business information be considered confidential, cable operators may request such treatment pursuant to our rules. 47 C.F.R. §76.922(i).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision of Raleigh LOI-94-6
Hillsborough, North Carolina

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a letter received by the Commission, dated December 20, 1993, the Town of Hillsborough, North Carolina, alleged violations by Time Warner Cable, d/b/a Cablevision of Raleigh ("Cablevision"), of Commission regulations governing the provision of cable television service. In response to this complaint, the Commission issued Letter of Inquiry 94-6 ("LOI") to Cablevision on February, 22 1994.[1] The LOI asked Cablevision to provide information concerning, among other issues, rate and service changes in anticipation of, and/or inx response to, rate regulation.[2] Cablevision responded to our LOI on March 25, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the pur-

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[1] Letter from Alexandra M. Wilson, Acting Chief, Cable Services Bureau, FCC, to Cablevision, LOI-94-6 (February 22, 1994). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Cablevision. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Cablevision to make refunds to subscribers in regard to Cablevision's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] The LOI also requested information concerning Cablevision's compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of Cablevision's a la carte package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623 (a)(2), 47 U.S.C. § 543 (a)(2) (1992).

[4] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii) (1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1) (1992).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2) (1992).

[9] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A) (1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

poses of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order*, the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Cablevision's services included a 13 channel basic tier for $9.95 per month, a seven channel cable programming service tier, called Tier 2, for $6.35 per month, and an additional 11 channel cable programming service tier, called Tier 3, for $4.65 per month.

7. The following chart summarizes Cablevision's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic tier	13	$ 9.95
2. Tier 2	7	$ 6.35
3. Tier 3	11	$ 4.65
Total	31	$20.95

8. Beginning September 1, 1993, the date our rate regulations became effective, Cablevision restructured its service offerings. Cablevision's restructured service offerings included a 12 channel basic tier for $7.51 per month, a six channel cable programming service tier, called Tier 2, for $3.76 per month, and an additional 12 channel cable programming service tier, called Tier 3, for $7.51 per month. Cablevision also states that three channels could be purchased on an individual basis as well as in a separate package. The three channels were WTBS, the Discovery Channel, and American Movie Classics ("AMC"). The Discovery Channel and AMC were originally part of Cablevision's cable programming service tiers (The Discovery Channel was part of Tier 1 and AMC was part of Tier 2) and WTBS was originally part of Cablevision's basic service tier.

9. Cablevision states that the three a la carte channels could be purchased individually for $1.30 per month. All three channels could be purchased as a package for $2.17 per month.

10. The following chart summarizes Cablevision's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Basic tier	12	$ 7.51
2. Tier 2	6	$ 3.76
3. Tier 3	12	$ 7.51
4. A la carte package	3	$ 2.17
Total	33	$20.95

11. Cablevision argues, *inter alia*, that it began offering its services individually and through the a la carte package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of the date of its response, Cablevision states that two subscriptions to individual channels were made, while 163 of Cablevision's 176 subscribers took the a la carte package.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[15] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[16] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[17] First, we examine whether Cablevision's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Cablevision's restructuring effective September 1, 1993, involved its movement of one channel (WTBS) from its 13 channel basic tier and one channel from each of its seven and 11 channel cable programming service tiers to create the three-channel package that it alleges is not rate-regulated. Thus, Cablevision removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Cablevision avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Cablevision had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers who were receiving the basic tier channel and the two cable programming service tier channels at issue apparently continued to receive them after the restructuring, and there appears to be no sufficient justification for Cablevision's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that Cablevision's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it appears that Cablevision automati-

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[11] H.R. Rep. No. 628 at 79.
[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).
[13] *Rate Order* ¶ 451.
[14] This Order does not evaluate Cablevision's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.
[15] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).
[16] *Rate Order* ¶ 451.
[17] *Id.* at ¶ 453.

cally subscribed its customers to the offerings that previously had been part of its basic and cable programming service tiers. In light of these facts, it appears that Cablevision's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Cablevision's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Cablevision would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[18]

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion coulddisadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[19] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[20] This is not the type of offering that Cablevision and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[21]

17. Under the two-part test that we set forth in the *Rate Order*, Pit is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the three services, because subscribers may purchase the three channels for $1.30 each or the three-channel package for $2.17. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Cablevision's submission reveals that there were only two subscriptions to individual a la carte channels. Our test does not specify what number would indicate that an offering is "a realistic service offering." However, the fact that such a low number of subscribers opted for individual channels rather than the package, together with the other factors present in this case,[22] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[23] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Cablevision's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (three) was small.[24] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Cablevision that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[25] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has

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[18] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶46 . However, in order to determine whether Cablevision evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[19] *Rate Order* ¶ 329.

[20] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[21] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[22] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[23] *Second Reconsideration Order* at ¶ 196.

[24] *Id.*

[25] *See Going Forward Order* at ¶ 40.

been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Cablevision's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject Cablevision to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[26] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation, while here, Cablevision attempted to treat only three channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[27] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[28]

21. We will not require Cablevision to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[29] Instead, on a prospective basis, we will consider Cablevision's collective offering of a la carte channels a new product tier[30] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Cablevision's three-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Cablevision or its Hillsborough customers to the confusion and transaction costs that would result if we required Cablevision to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Cablevision's package as it existed on February 22, 1994, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[26] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[27] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[28] *Second Reconsideration Order* ¶ 196.

[29] We are not precluding Cablevision from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[30] *See Going Forward Order* at ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US Cable
City of Lake Forest, IL LOI 93-13
Village of Lake Bluff, IL

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In letters received by the Commission, dated September 5, 1993, and September 30, 1993, the City of Lakeforest and the Village of Lake Bluff, respectively, alleged violations by US Cable Corporation ("US Cable") of Commission regulations governing the provision of cable television service. In response to these complaints, the Commission issued Letter of Inquiry 93-13 ("LOI") to US Cable on November 17, 1993.[1] The LOI asked US Cable to provide information concerning, among other issues, its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated.[2] US Cable responded to our LOI on December 16, 1993.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the pur-

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Paul L. Ashley, General Manager, US Cable, LOI-93-13 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there are pending rate complaint proceedings involving US Cable in both its Lake Forest and Lake Bluff franchise areas. Our decisions made herein will be made a part of those proceedings. Thus, for example, we will not order US Cable to make refunds to subscribers in regard to US Cable's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] The LOI also requested information concerning charges for service calls, negative option billing and compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 8(a)(2)(1992).

[4] Pub. L. No. 102-385 § 2 (b) (4) (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii)(1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1)(1992).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2)(1992).

[9] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A)(1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h)(1992).

poses of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, US Cable's services included a 21 channel basic tier for $11.50 per month and a 29 channel cable programming service tier, called Tier 2, for $15.65 per month. US Cable's customers could purchase a total of 50 channels for the price of $27.15 per month. The following chart summarizes US Cable's service tier options prior to September 1, 1993:

Offering	Channels	Price
1. Basic	21	$11.50
2. Tier 2	29	$15.65
TOTAL	50	$27.15

7. On September 1, 1993, the date our rate regulations became effective, US Cable states that it moved four channels, one (WTBS) from the basic tier and three (American Movie Classics (AMC), The Discovery Channel (Discovery), and the Sci-Fi Channel) from Tier 2, and offered the channels to its subscribers individually or on a package basis through the Pick 4 Pack. US Cable states that these channels could be purchased individually for $ .50 each or as a package for $1.60. US Cable also changed its basic tier rate to $11.93 and its cable programming service tier rate, now called Satellite Service, to $17.04. In addition, it states that it automatically subscribed its Tier 2 customers to the Pick 4 Pack. US Cable's restructuring allowed customers to receive 55 channels at a total price of $30.57 per month. The following chart summarizes US Cable's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Basic	21	$11.93
2. Satellite Service	30	$17.04
3. Pick 4 Pack	4	$ 1.60 or $ .50 per channel
Expanded Service (TOTAL)	55	$30.57 (if purchased package)

8. US Cable argues, *inter alia*, that it began offering its services individually and through its Pick 4 Pack in order to implement Congress' intent to maximize consumer choice. However, based on this record, very few consumers elected to exercise that choice. US Cable's response provides a breakdown of its subscribers who chose the package of individual channels. Of 4,729 total subscribers, 4,462 or 94 percent, subscribe to the Pick 4 Pack; 63 subscribers, or approximately one percent, subscribe to one or more of the individual a la carte channels.[15]

IV. DISCUSSION

9. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[16] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[17] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[18] First, we examine whether US Cable's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

10. US Cable's restructuring effective September 1, 1993, involved its movement of one channel (WTBS) from its basic tier and three channels (AMC, Discovery, and Sci-Fi) from its cable programming service tier, Tier 2, to create the four-channel package that it alleges is not rate-regulated. Thus, US Cable removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, US Cable avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if US Cable had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers that were receiving Tier 2 continued to receive the four channels at issue after the restructuring, and there appears to be no sufficient justification for US Cable's restructuring other than to avoid rate regulation.

11. Other factors corroborate our view that US Cable's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it automatically subscribed its Tier 2 customers to the Pick 4 Pack. In light of these facts, it appears that US Cable's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if US Cable's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met the Commission's requirements for a permissible collective offering of a la carte

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[11] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 79 (1992).
[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).
[13] *Rate Order* ¶ 451.
[14] This order does not evaluate US Cable's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.
[15] US Cable states that, at a minimum, a total of 127 subscribers chose to avail themselves of the option to decline at least one of the a la carte channels during September, 1993.
[16] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h)(1992).
[17] *Rate Order* ¶ 451.
[18] *Id.* at ¶ 453.

channels, then US Cable would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[19]

12. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[20] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[21] This is not the type of offering that US Cable and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

13. Moreover, in the *Rate Order*, the Commission determined that ala carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[22]

14. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the four services, because subscribers may purchase each channel for $ .50 or the four-channel package for $1.60. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of US Cable's submission reveal that only 127 of US Cable's 4,729 subscribers in Lake Forest and Lake Bluff chose to decline at least one of the a la carte channels. Although only approximately 2.7 percent of US Cable's subscribers chose to decline at least one of the a la carte channels, our test does not specify what percentage would indicate that an offering is "a realistic service offering." However, this fact, together with the other factors present in this case,[23] tends to show that the per-channel offering, in this instance, does not constitute a realistic service offering.

15. Even if we were to apply the 15 interpretative guidelines setforth in our *Second Reconsideration Order*,[24] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that US Cable's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from a regulated tier, the absolute number (four) was small.[25] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to US Cable that its restructuring was not a permissible a la carte package.

16. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order*'s two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered an evasion of rate regulation.[26] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that US Cable's restructuring was not a permissible a la carte package.

17. For that reason, we do not think that it would be equitable to subject US Cable to refund liability. This result is distinguishable from the result we reached in *Adelphia*

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[19] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. However, in order to determine whether US Cable evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[20] *Rate Order* ¶ 329.

[21] *See, e.g., Rate Order* at ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[22] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report & Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 interpretive guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[23] *See* ¶ ¶ 10-11, *supra*.

[24] *Second Reconsideration Order* ¶ 196.

[25] *Id.*

[26] *See Going Forward Order* ¶ 40.

Cable Partners, L.P.,[27] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la cartechannels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, US Cable attempted to treat only four channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were, in many instances, unclear, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[28] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[29]

18. We will not require US Cable to restructure its tiers so as to return the channels offered in the a la carte package to a regulated tier,[30] instead, on a prospective basis, we will consider US Cable's collective offering of a la carte channels a new product tier[31] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because US Cable's four-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject US Cable or its Lake Forest and Lake Bluff customers to the confusion and transaction costs that would result if we required US Cable to retier.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that US Cable's package as it existed on November 17, 1993, may be treated as a new product tier under our *Going Forward Order*.

20. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[27] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[28] *Rate Order*, 8 FCC Rcd 5837 n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[29] *Second Reconsideration Order* ¶ 196.

[30] We are not precluding US Cable from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier."

[31] *See Going Forward Order* ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Comcast Cablevision LOI-94-11
Sterling Heights, Michigan

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In letters to the Commission dated September 16, 1993, November 18, 1993, and January 6, 1994, the City of Sterling Heights, Michigan alleged violations by Comcast Cablevision of Sterling Heights, Michigan ("Comcast") of Commission regulations governing the provision of cable television service. In response to these complaints, the Commission issued Letter of Inquiry 94-11 ("LOI") to Comcast on February 22, 1994.[1] The LOI asked Comcast to provide information concerning, among other issues, certain rate and service changes made in anticipation of and/or in response to rate regulation, including the offering of channels on an individual and package basis.[2] Comcast responded to our LOI on March 24, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[11] This provision in the 1992 Cable

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[1] Letter from Alexandra M. Wilson, Acting Chief, Cable Services Bureau, FCC, to Comcast Cablevision of Sterling Heights, Michigan, LOI-94-11 (February 22, 1994). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Comcast. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Comcast to make refunds to subscribers in regard to Comcast's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] The LOI also requested information concerning Comcast's compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623(a)(2), 47 8U.S.C. § 543 (a)(2) (1992).

[4] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623(b)(7)(A)(ii-iii), 47 U.S.C. § 543(b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623(b)(1), 47 U.S.C. § 543(b)(1).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[9] Communications Act of 1934 § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

[11] H.R. Rep. No. 628 at 79.

Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Comcast's services included a 16-channel basic tier, called Limited Basic, for $6.95 per month, a 5-channel cable programming service tier, called Cable Lite Satellite Service, for $8.00 per month and a 20-channel cable programming service tier, called Deluxe Satellite Service, for $10.10 per month. These three tiers of service could be purchased together as a package, called Expanded Basic, for $25.05 per month.

7. The following chart summarizes Comcast's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Limited Basic	16	$ 6.95
2. Cable Lite Satellite Service	5	$ 8.00
3. Deluxe Satellite Service	20	$10.10
TOTAL (Expanded Basic)	41	$25.05

8. Beginning September 1, 1993, the date our rate regulations became effective, Comcast restructured its service offerings. Comcast's restructured service offerings included a 17-channel basic tier, called Limited Basic, for $8.39 per month and a 27-channel cable programming service tier, called Standard Service, for $13.32 per month. Comcast states that it also began offering four channels on an individual and package basis. The four channels were The Discovery Channel, Turner Network Television ("TNT"), WTBS-Atlanta and WGN-Chicago. Comcast indicates that WTBS and WGN were originally in Comcast's Limited Basic service tier, The Discovery Channel was in Comcast's Cable Lite Satellite Service tier and TNT was in Comcast's Deluxe Satellite Service tier.

9. Comcast states that The Discovery Channel, WTBS and WGN could be purchased individually for $0.25 per month and TNT could be purchased individually for $0.37 per month. All four channels could be purchased as a package, called Value Pak, for $0.49 per month. If a subscriber purchased Limited Basic, Standard Service and Value Pak, this was called Preferred Service and cost $22.20 per month.

10. The following chart summarizes Comcast's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Limited Basic	17	$ 8.39
2. Standard Service	27	$13.32
3. Value Pak	4	$ 0.49 (if purchased package)
TOTAL (Preferred Service)	48	$22.20

11. Comcast argues, *inter alia*, that it began offering its services individually and through the Value Pak package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. Comcast indicates that, as of October 1993, of 27,873 total subscribers in Sterling Heights, 27,085 received the package and none of them received individual a la carte channels.[15] Comcast's response also indicates that Expanded Basic subscribers were automatically subscribed to Value Pak.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[16] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[17] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[18] First, we examine whether Comcast's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Comcast's restructuring effective September 1, 1993, involved its movement of two channels (WTBS and WGN) from its 16-channel Limited Basic service tier, one channel (The Discovery Channel) from its 5-channel Cable Lite Satellite Service tier and one channel (TNT) from its 20-channel Deluxe Satellite Service tier to create the four-channel package that it alleges is not rate-regulated. Thus, Comcast removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Comcast avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Comcast had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, the Expanded Basic customers who were previously receiving the four channels at issue continued to receive them after the restructuring, and there appears to be no sufficient justification for Comcast's restructuring other than to avoid rate regulation.

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[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[13] *Rate Order* ¶ 451.

[14] This Order does not evaluate Comcast's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[15] *See* Comcast's FCC Rate Freeze Computation Form for Sterling Heights, Michigan attached to its March 24, 1994, response to our LOI.

[16] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[17] *Rate Order* ¶ 451.

[18] *Id.* at ¶ 453.

14. Other factors corroborate our view that Comcast's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it automatically subscribed its Expanded Basic customers to the offerings that previously had been part of its basic and cable programming service tiers. In light of these facts, it appears that Comcast's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Comcast's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Comcast would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[19]

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[20] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[21] This is not the type of offering that Comcast and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from tiers that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[22]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the four services because subscribers may purchase three of the channels for $0.25 each and the fourth channel for $0.37 or the four-channel package for $0.49. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Comcast's submission reveals that, as of October 1993, of 27,873 total subscribers in Sterling Heights, 27,085 received the package and none of them received individual a la carte channels. Our test does not specify what number would indicate that an offering is "a realistic service offering." However, this fact, together with the other factors present in this case,[23] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[24] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Comcast's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (four) was small.[25] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Comcast that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte

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[19] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 #(adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id* at ¶46. However, in order to determine whether Comcast evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[20] *Rate Order* ¶ 329.

[21] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[22] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[23] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[24] *Second Reconsideration Order* at ¶ 196.

[25] *Id.*

channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[26] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Comcast's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject Comcast to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[27] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, Comcast attempted to treat only four channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[28] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[29]

21. We will not require Comcast to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[30] Instead, on a prospective basis, we will consider Comcast's collective offering of a la carte channels a new product tier[31] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Comcast's four-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Comcast or its Sterling Heights customers to the confusion and transaction costs that would result if we required Comcast to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Comcast's package as it existed on February 22, 1994, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[26] *See Going Forward Order* at ¶40.

[27] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[28] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[29] *Second Reconsideration Order* ¶ 196.

[30] We are not precluding Comcast from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[31] *See Going Forward Order* ¶ ¶16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision Industries LOI-94-10
Morrisville and Hillsborough,
North Carolina

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received letters from the towns of Morrisville, North Carolina, dated December 10, 1993, and Hillsborough, North Carolina, dated December 20, 1993, alleging violations by Cablevision Industries ("CVI") of the Commission's regulations governing the provision of cable television service in those communities. In response to these complaints, the Commission issued Letter of Inquiry 94-10 ("LOI") to CVI on February 22, 1994.[1] The LOI asked CVI to provide information concerning, among other issues, certain rate and service changes made in anticipation of and/or in response to rate regulation, including the offering of channels on an individual and package basis.[2] CVI responded to our LOI on March 24, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the pur-

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[1] Letter from Alexandra M. Wilson, Acting Chief, Cable Services Bureau, FCC, to Cablevision Industries of Morrisville and Hillsborough, North Carolina, LOI-94-10 (February 22, 1994). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We note that there is a pending rate complaint proceeding involving CVI in Morrisville. Our decision made herein will be made a part of that proceeding. Thus, for example, we will not order CVI to make refunds to subscribers in regard to CVI's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds. We further note that there is no valid pending rate complaint against CVI in Hillsborough. Therefore, we will only decide this LOI with regard to Morrisville.

[2] The LOI also requested information concerning Century's compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623(a)(2), 47 U.S.C. § 543(a)(2) (1992).

[4] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623(b)(7)(A)(ii-iii), 47 U.S.C. § 543(b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623(b)(1), 47 U.S.C. § 543(b)(1).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[9] Communications Act of 1934 § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

poses of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order*, the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, CVI's Morrisville system offered a 12 channel basic tier, called Basic Reception Service, for $11.95 per month, and a 21 channel cable programming service tier, called Programming Service Tier 1, for $11.45 per month. In order to receive Programming Service Tier 1, subscribers were required to purchase the Basic Reception Service.

7. The following charts summarize CVI's service tier offerings in Morrisville prior to September 1, 1993:

Offering	Channels	Price
1. Basic Reception Service	12	$11.95
2. Programming Service Tier 1	21	$11.45
Total	33	$23.40

8. Beginning September 1, 1993, the date our rate regulations became effective, CVI restructured its service offerings. On its Morrisville system, CVI's restructured service offerings included a 14 channel basic tier, called Basic Reception Service, for $9.25 per month, an 18 channel cable programming service tier, called Programming Service Tier 1, for $12.55 per month, and three channels it states were offered on an individual basis and as a package. The three channels, HTS, Cable News Network (CNN), and The Discovery Channel, were offered as part of Programming Service Tier 1 prior to September 1, 1993.

9. CVI states that the three channels could be purchased individually for $1.50 per month. All three channels could be purchased as a package, called Expanded Programming Package, for $3.00 per month.

10. The following charts summarize CVI's service tier options on its Morrisville system as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Basic Reception Service	14	$ 9.25
2. Programming Service Tier 1	18	$12.55
3. Expanded Programming Package	3	$ 3.00
Total	35	$24.80

11. CVI argues, *inter alia*, that it began offering its services individually and through the Expanded Programming Package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of December 1993, CVI states that in its Morrisville system, 4 subscribers purchased one or more individual channels, while 477 subscribed to the Expanded Programming Package.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[15] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[16] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[17] First, we examine whether CVI's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. CVI's restructuring effective September 1, 1993, involved its movement of three channels (HTS, CNN and Discovery) from its 21 channel Programming Services Tier 1 in Morrisville to create the three-channel package that it alleges is not rate-regulated. Thus, CVI removed channels from otherwise rate-regulated tiers to create new packages of channels. In so doing, CVI avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if CVI had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers who were receiving the three Programming Services Tier 1 channels at issue apparently continued to receive them after the restructuring, and there appears to be no sufficient justification for CVI's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that CVI's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it appears that CVI automatically sub-

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[11] H.R. Rep. No. 628 at 79.
[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).
[13] *Rate Order* ¶ 451.
[14] This Order does not evaluate CVI's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in a separate proceeding.
[15] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).
[16] *Rate Order* ¶ 451.
[17] *Id.* at ¶ 453.

scribed its Programming Service Tier 1 customers to the offerings that previously had been part of its cable programming service tiers. In light of these facts, it appears that CVI's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if CVI's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then CVI would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[18]

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[19] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[20] This is not the type of offering that CVI and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[21]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the three services, because subscribers may purchase the three channels for $1.50 each or the three-channel package for $3.00. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of CVI's submission reveals that only 3 percent of its Morrisville subscribers chose not to purchase the Expanded Programming Package. Our test does not specify what percentage would indicate that an offering is "a realistic service offering." However, the fact that such a low percentage of subscribers opted for individual channels rather than the package, together with the other factors present in this case,[22] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[23] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that CVI's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (three) was small.[24] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to CVI that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not "an evasion of rate regulation."[25] Our experience to date, "however, indicates that our efforts did

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[18] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) (*"Going Forward Order"*). Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶46 . However, in order to determine whether CVI evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[19] *Rate Order* ¶ 329.

[20] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[21] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an "evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[22] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[23] *Second Reconsideration Order* at ¶ 196.

[24] *Id.*

[25] *See Going Forward Order* at ¶ 40.

not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that CVI's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject CVI to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[26] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation, while here, CVI did not eliminate any cable programming service tiers. CVI attempted to treat only three channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[27] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[28]

21. We will not require CVI to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[29] Instead, on a prospective basis, we will consider CVI's collective offering of a la carte channels a new product tier[30] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because CVI's three-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject CVI or its Morrisville customers to the confusion and transaction costs that would result if we required CVI to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that CVI's package as it existed on February 22, 1994, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[26] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[27] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[28] *Second Reconsideration Order* ¶ 196.

[29] We are not precluding CVI from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[30] *See Going Forward Order* at ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WB CABLE ASSOCIATES, LTD.

Partial Petition for Reconsideration
of Certification of
City of Boca Raton, Florida
to Regulate Basic Cable Service Rates
FCC Community ID No. (FL0278)

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 13, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 13, 1994, WB Cable Associates, Ltd. d/b/a West Boca Cablevision ("West Boca") filed a timely partial petition for reconsideration challenging the certification of the City of Boca Raton, FL ("Boca Raton" or "The City") to regulate rates for the basic cable service and associated equipment.[1] The City did not file an opposition to West Boca's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the "franchise authority has actual knowledge to the contrary.[3] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[5] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[6]

II. DISCUSSION

3. In its petition, West Boca states that its cable system is subject to effective competition because the system serves fewer than 30 percent of the "households" in Boca Raton, its franchise area.[7] West Boca states that it serves 198 of the 33,134 "households" in Boca Raton. As support, West Boca submits an affidavit from John T. Gash, General Manager, West Boca Cablevision. In the affidavit, however, West Boca states that there are approximately 33,134 "existing dwelling units" in Boca Raton according to statistics compiled by the City for the year 1991. West Boca refers to "households" in its petition and "existing dwelling units" in the affidavit, but does not clearly explain upon which it bases its effective competition claim.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[8] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, exists in the franchise area.[9] West Boca has not met this burden. In order to demonstrate the presence of effective competition, our rules require the use of data reflecting the number of households (*i.e.*, occupied housing units) in the franchise area. *See Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units or even partial-year vacant units." The term "households" is defined for purposes of the 1990 Census to include only occupied housing units. Here, West Boca submits no evidence clarifying whether it's use of "existing dwelling units" excludes vacant housing units. As West Boca has failed to submit evidence demonstrating that its effective competition claim is based on "households" its petition is denied.[10]

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[1] The City of Boca Raton filed its "Certification of Franchising Authority to Regulate Basic Service Rates and Initial Finding of Lack of Effective Competition" (FCC Form 328) on October 18, 1993. Its certification became effective on November 17, 1993.

[2] 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Commission's Rules provide that only the rates of cable systems which are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 per cent of the households in the franchise area subscribe to the cable service of a cable system. 47 C.F.R. §76.905(a) and(b)(1).

[8] 47 C.F.R. § 76.906

[9] 47 C.F.R. § 76.911(b)

[10] Should West Boca wish to submit more specific information sufficient to demonstrate the presence of effective competition, it may submit such information by filing a petition for revocation pursuant to Section 76.914 of the Commission's Rules. *See* 47 C.F.R. § 76.914.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by WB Cable Associates, Ltd. d/b/a West Boca Cablevision challenging the certification of the City of Boca Raton, Florida to regulate West Boca Cablevision's basic cable service rates IS DENIED.

6. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

7. IT IS FURTHER ORDERED that West Boca Cablevision SHALL FILE the required rate justifications on the appropriate forms with the City of Boca Raton, Florida within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from the franchising authority that it is regulating West Boca Cablevision's rates, whichever is later.

8. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS
OF MICHIGAN, INC.

Petition for Reconsideration

of the Certification
of Deerfield Township, Michigan
to regulate basic cable rates (MI1609)

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 13, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 21, 1994, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely Petition for Reconsideration challenging the certification of Deerfield Township, Michigan ("Deerfield") to regulate rates for basic cable service and associated equipment.[1] Deerfield filed an Answer to Petition for Reconsideration ("Answer") to which C-TEC filed a Reply. Both parties filed additional pleadings[2] pursuant to the Commissions, July 29, 1994 Order.[3]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[5] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[8]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Deerfield, its franchise area.[9] C-TEC claims that it currently serves only 45 of the 1,548 households (that is, occupied housing units)[10] in Deerfield, or 2.9 percent of the total number of households. As supporting documentation, C-TEC provides 1990 Census data[11] which shows that there are 1,548 households in Deerfield. C-TEC also submits a computer print-out with sufficient subscriber information to support its claim that it serves 45 subscribers in the franchise area.

4. Deerfield's Answer disputes the boundaries of C-TEC's franchise area. Noting that the township is served by two cable operators -- C-TEC and D.F. Cablevision -- and that each operator has an exclusive and separate franchise area, Deerfield claims that C-TEC's franchise area consists of no more than approximately 100 homes in the southwest sec-

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[1] Deerfield Township filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on December 20, 1993, which became effective on January 19, 1994.

[2] C-TEC's supplemental pleading was accompanied by a motion for leave to file out of time as it was filed 12 days after the 21-day filing window provided in the Commission's July 29, 1994 Order. *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*). Deerfield, 19 days later, filed an Answer to Motion for Leave to File Out of Time opposing C-TEC's request to supplement its Petition for Reconsideration because it was filed out of time. Although Deerfield styled its pleading as an answer, under the Commission's Rules it is an opposition which must be filed within 10 days after the original pleading is filed. *See* 47 C.F.R. §1.45(a). Thus, both C-TEC's supplement and Deerfield's opposition thereto are untimely filed. Because C-TEC's supplement contained the Census information and the subscriber information solicited by the Commission and because the 12-day lapse did not prejudice Deerfield, we will grant C-TEC's motion.

[3] *Effective Competition Order*, 9 FCC Rcd 3656 (1994).

[4] 47 U.S.C. §543(a)(4).

[5] 47 C.F.R. §§76.906, 76.910(b)(4).

[6] 47 C.F.R. §76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or 4) the cable system in question is subject to effective competition. 47 C.F.R. §76.910(b). *See also* 47 U.S.C. §543(a)(4).

[7] 47 C.F.R. §§1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. §76.911(c).

[9] The Commission's Rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's Rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. 47 C.F.R. §76.905(a) and (b)(1).

[10] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] As the Commission has stated previously, 1990 Census data is an appropriate source for household data. *Effective Competition Order*, 9 FCC Rcd 3656 (1994).

tion of Deerfield. Within this area, approximately 47 homes subscribe to C-TEC, resulting in a 47 percent subscribership rate.

5. C-Tec filed a Reply to Deerfield's Answer which disputes Deerfield's characterization of its franchise area. C-Tec maintains that neither C-TEC, nor D.F. Cablevision, has an exclusive franchise or a franchise that limits its service area. C-TEC also denied Deerfield's allegation that C-TEC has affirmatively restricted its service to specific areas of the Deerfield Township franchise area. Rather, C-TEC asserts that it is interested in expanding service to new areas of the franchise area whenever it becomes economically feasible to do so.

6. We are unpersuaded that the appropriate franchise area for purposes of effective competition is something less than the entire Township of Deerfield. First, Deerfield's claim that C-TEC has a separate and exclusive franchise to serve the southwest section of Deerfield is unsupported. The unexecuted franchise agreement between Deerfield and C-TEC attached to Deerfield's Answer states in the "Grant of Franchise" provision that Deerfield ". . . grants to C-TEC, subject to the provisions herein contained, a *non-exclusive* franchise to engage in the business of operating and providing a cable television system within the Township. . . ."[12] Deerfield cites no provision of the franchise agreement, nor other evidence, supporting the proposition that C-TEC's franchise area is other than the Township of Deerfield.

7. To the extent that Deerfield suggests that C-TEC has affirmatively redefined its franchise area to encompass a smaller portion of the Township, we find no evidence to support such an assertion.[13] Deerfield provides insufficient evidence top support a claim that C-TEC has made an affirmative decision to limit its service to a specified portion of the Township. Without providing adequate support for its claims, Deerfield merely concludes that C-TEC has decided not to serve the entire franchise area because C-TEC has not expanded to fill its entire franchise area. However, "[t]he fact that a franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area."[14] Moreover, C-TEC states that it has urged Deerfield to notify C-TEC of unserved communities in its franchise area that it would be economically feasible to serve.[15] Therefore, we conclude that Deerfield has failed to sustain its burden of proof that C-TEC has redefined its franchise area.

8. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[16] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within the franchise area.[17] C-TEC has met this burden.

9. We find that C-TEC appropriately relied on data reflecting the number of households as required by our rules.[18] Relying on this data, C-TEC has submitted sufficient evidence demonstrating that its cable system serving Deerfield, its franchise area, serves 45 of the 1,548 households, or 2.9 percent of the households within its franchise area. Thus, we find C-TEC's system serving the Township of Deerfield is subject to effective competition. Accordingly, its Petition for Reconsideration is granted.

III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by C-TEC Cable Systems of Michigan, Inc. challenging the Certification of the Township of Deerfield, Michigan IS GRANTED.

11. IT IS FURTHER ORDERED that the certification of the Township of Deerfield, Michigan to regulate C-TEC's basic cable rates IS RESCINDED.

12. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's Rules.[19]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[12] Deerfield Answer, Attachment A at 1 (emphasis added).

[13] In its *First Order on Reconsideration*, the Commission clarified the definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) (*"First Recon. Order"*). Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[14] *First Recon. Order, supra.*

[15] Reply to Answer to Petition for Reconsideration at 3.

[16] 47 C.F.R. §76.906.

[17] 47 C.F.R. §76.911(b)(1).

[18] *Third Recon. Order, supra.*

[19] 47 C.F.R. §0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS
OF MICHIGAN, INC.

Petition for Reconsideration
of Certification of
Rutland Charter Township, MI
to Regulate Basic Cable Service Rates
(MI0818)

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 13, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On October 26, 1993, C-TEC Cable Systems of Michigan ("C-TEC") filed a timely petition for reconsideration challenging the certification of Rutland Charter Township ("Rutland") to regulate rates for basic cable service and associated equipment.[1] In addition, C-TEC submitted its supplemental pleading in response to the Commission's July 29, 1994 Order.[2] Finally, C-TEC submitted a response dated November 30, 1994 to a Bureau request dated November 25, 1994, asking for clarification on previously-filed information.[3] Rutland did not file an opposition to C-TEC's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless they have actual knowledge to the contrary.[5] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging the presence of effective competition.[8]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Rutland, its franchise area.[9] C-TEC claims that it currently serves only 280 of the 962 households (that is, occupied housing units)[10] in Rutland, or approximately 29.1 percent of the households in Rutland. As supporting documentation, C-TEC provides a copy of the relevant page from the 1990 Census data[11] which shows that there are 962 occupied housing units in Rutland. C-TEC also submits a computer print-out with sufficient subscriber information to support its claim that it serves 280 subscribers in its franchise area. Finally, C-TEC provides a declaration under penalty of perjury from a responsible official certifying to the accuracy of the data included in the petition.[12]

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[13] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within

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[1] Rutland filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" on September 20, 1993. Its certification became effective on October 20, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[3] Letter to Jacqueline Cleary, Counsel to C-TEC Cable Systems of Michigan (November 25, 1994).

[4] 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also*, 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. § 76.911(c).

[9] The Commission rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of the cable system. 47 C.F.R. § 76.905(a) and (b)(1).

[10] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census U.S. Dept. of Commerce, 1990 Census of Population, Summary Population and Housing Characteristics, CPH-1-1B, Appendix B at B-8.

[11] As the we stated recently, the 1990 Census data is an appropriate source for household data. *Cable Operators' Petition for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[12] *See* Declaration of Robin R. Troop, Vice President and General Manager, dated October 25, 1993.

[13] 47 C.F.R. § 76.906.

its franchise area.[14] C-TEC meets this burden. C-TEC has appropriately relied on data reflecting the number of households as required by our rules.[15] Relying on this data, C-TEC has submitted sufficient evidence demonstrating that its cable system serving Rutland, its franchise area, serves 280 of the 962 households, or 29.1 percent of the households, within its franchise area.[16] Accordingly, we grant its petition.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by C-TEC Cable Systems of Michigan challenging the certification of Rutland Charter Township to regulate C-TEC's basic service cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Rutland Charter Township to regulate the rates for basic cable service and associate equipment of C-TEC IS RESCINDED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[14] 47 C.F.R. § 76.911(b)(1).

[15] *Third Recon. Order, supra.*

[16] Initially, in its petition for reconsideration, C-TEC stated that it served 286 of 1,045 "homes" in its franchise area. This "homes" data was apparently based on the number of housing units (occupied and vacant) in Rutland Charter Township. In its supplement, however, C-TEC submitted data demonstrating that there are 962 occupied housing units in the franchise area. C-TEC also indicated that it currently serves 280, not 286, subscribers. In its November 30, 1994 response, C-TEC explained that "[a]ny differences in subscriber information supplied in C-TEC's original filings and C-TEC's supplemental filings are attributable to changes in the number of subscribers in the time between the original submission and the supplement. C-TEC updated subscriber information in its supplements so that the effective competition' analysis was based on the most recent information available." We will accept C-TEC's updated subscriber numbers as accurate. As C-TEC's supplement contains the appropriate housing and subscriber data, we have relied upon it for purposes of our analysis.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELE-MEDIA COMPANY OF
SOUTHWEST LOUISIANA

Petition for Reconsideration

of Certification of
Calcasieu Parish, LA (LA0252)
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 13, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On February 3, 1994, Tele-Media Company of Southwest Louisiana ("Tele-Media") filed a petition[1] challenging the certification of Calcasieu Parish ("Calcasieu") to regulate rates for basic cable service and associated equipment.[2] Calcasieu did not file an opposition to Tele-Media's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchising authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Once the period for filing a petition for reconsideration has elapsed, a cable operator may challenge a franchising authority's certification by filing a petition for revocation.[7] Regardless of its grounds, however, a petition for revocation does not automatically trigger a stay of a franchising authority's power to regulate basic cable service rates.[8]

II. DISCUSSION

3. Tele-Media states that its system serving Calcasieu is subject to effective competition because the system serves fewer than 30 percent of the households within "certain areas of Calcasie Parish," its franchise area.[9] Specifically, Tele-Media states that it serves 586 of the "no less than 20,000 households" in its franchise area, or approximately three percent of the total number of households "based upon local census information." Tele-Media submits a declaration under penalty of perjury from a responsible company official attesting to the accuracy of the facts alleged. Tele-Media's petition does not include sufficient information which clearly demonstrates that Tele-Media has relied on household data as that term is used for purposes of effective competition. For instance, the petition does not include a copy of the relevant tables or pages from the census data or even a citation to the relevant pages or tables within the census.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[10] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[11] We find that Tele-Media has failed to meet this burden. Tele-Media did not support its effective competition claim with adequate documentation. Our rules require the use of data reflecting the number of "households" in the franchise area.[12] Although Tele-Media's

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[1] Tele-Media filed a pleading styled as a "motion for reconsideration" on February 3, 1994. Calcasieu's certification, however, became effective on November 13, 1993. Thus, any motion or petition for reconsideration challenging Calcasieu's certification must have been filed no later than December 13, 1994. *See* 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*). Tele-Media's petition, thus, was filed almost two months after the deadline for filing petitions for reconsideration had elapsed. Accordingly, we will treat Tele-Media's pleading as a "petition for revocation."

[2] Calcasieu filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" on October 14, 1993. Its certification became effective on November 13, 1994.

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b)(4). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911, *Rate Order*, *supra*, at note 1.

[7] 47 C.F.R. § 76.914.

[8] 47 C.F.R. § 76.914(d).

[9] The Commission rules provide that only the rates of cable systems that are subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of a cable system. 47 C.F.R. § 76.905(a) and (b)(1).

[10] 47 C.F.R. § 76.906.

[11] 47 C.F.R. § 76.911(b)(1).

[12] In its *Third Order on Reconsideration*, the Commission noted that "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). The term "households" is defined for purposes of the

petition makes an assertion about a particular number, it does not submit sufficient information upon which to determine that its effective competition claim is based on the precise factual information required. Accordingly, Tele-Media's petition is denied.[13]

III. ORDERING CLAUSES

5. Accordingly, IT IS SO ORDERED that the petition for revocation filed by challenging the certification of Calcasieu Parish to regulate Tele-Media's basic cable rates IS DENIED.

6. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

1990 Census to include only occupied housing units. *See* Bureau of the Census, Dept. of the Commerce, 1990 Census of Population, Summary Population and Housing Characteristics CPH-1-1B, Appendix B at B-8.

[13] Should Tele-Media wish to submit more specific information sufficient to demonstrate the presence of effective competition, it may submit such information by filing a petition for revocation pursuant to Section 76.914 of the Commission's Rules. *See* 47 C.F.R. § 76.914.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mid Carolina Cable

Petition for Revocation

of the Certification of
Aiken County Government (SC0540)
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 13, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On February 18, 1994 South Carolina Cable TV, L.P., which operates as Mid Carolina ("Mid Carolina") filed a petition challenging the certification of Aiken County Government ("Aiken County") to regulate rates for basic cable service and associated equipment.[1] Aiken County did not file an opposition to Mid Carolina's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6] Once the period for filing petitions for reconsideration has elapsed, cable operators may challenge a franchising authority's certification by filing a petition for revocation.[7] Regardless of its grounds, however, the filing of a petition for revocation does not automatically trigger a stay of a franchising authority's ability to regulate basic cable rates.[8]

II. DISCUSSION

3. Mid Carolina argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the "homes" in Aiken County, its franchise area.[9] Mid Carolina asserts that it serves 37 of the 44,883 "homes" or approximately .08 percent of the "homes" in Aiken County. As supporting documentation, Mid Carolina submits a declaration under penalty of perjury from a company official attesting to the accuracy of the information submitted. The declaration also notes that the "homes" data is taken from the 1990 Census of Housing. However, no complete and specific cite to the 1990 Census is offered. In addition, the declaration does not explain whether this "homes" data represents "household" data as that term is used for purposes of effective competition.[10] No other documentation is given.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[12] Mid Carolina has failed to meet that burden. Mid Carolina did not support its effective competition claim with adequate documentation. Mid Carolina's declaration under penalty of perjury in this case was purely conclusory. Although Mid Carolina's declaration makes

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[1] Mid Carolina filed a pleading styled as a "petition for reconsideration" on February 18, 1994. Aiken County's certification, however, became effective on November 12, 1994. Thus, any petition for reconsideration challenging Aiken County's certification must have been filed no later than December 12, 1993. *See* 47 C.F.R. §§ 1.106, 76.911. *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*). Mid Carolina's petition, thus, was filed almost two months after the deadline for filing petitions for reconsideration had elapsed. Accordingly, we will treat Mid Carolina's pleading as a "petition for revocation."

[2] 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Rate Order*, at 5693.

[6] 47 C.F.R. § 76.911(c).

[7] 47 C.F.R. § 76.914.

[8] 47 C.F.R. § 76.914(d).

[9] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's cable service. 47 C.F.R. § 76.905(a) and (b)(1).

[10] As the Commission stated recently, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics, 1990 CPH-1-24, Appendix B at B-8.

[11] 47 C.F.R. § 76.906.

[12] 47 C.F.R. § 76.911(b)(1)

reference to the 1990 Census, it does not explain the specific housing data relied upon to support its effective competition claim. Thus, it is unclear whether Mid Carolina relied upon "household" data as required by our rules. Accordingly, its petition is denied.[13]

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for revocation filed by Mid Carolina Cable challenging the certification of Aiken County Government to regulate basic cable rates IS DENIED.

6. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] Should the Mid Carolina wish to submit more specific information sufficient to demonstrate the presence of effective competition, it may submit such information by filing a petition for revocation pursuant to Section 76.914 of the Commission's Rules. *See* 47 C.F.R. § 76.914.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CMA NORTH CAROLINA CABLE
ASSOCIATES, LIMITED PARTNERSHIP

Petition for Reconsideration

of Certification of
Pamlico County, North Carolina
to regulate basic cable rates
(NC0645)

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 13, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 17, 1993, CMA North Carolina Cable Associates, Limited Partnership ("CMA") filed a timely petition for reconsideration challenging the certification of Pamlico County, North Carolina ("County") to regulate rates for basic cable service and associated equipment.[1] The County did not file an opposition to CMA's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

II. DISCUSSION

3. CMA argues that its cable system is subject to effective competition because the system serves fewer than 30 percent of the households in its franchise area.[7] In its petition, CMA claims that it serves only 988 of the 4,212 "households" in its franchise area; *i.e.*, 23.45 percent of the total number of households "based upon local census information and marketing data." CMA also submits a declaration under penalty of perjury from a responsible company official attesting to the accuracy of the facts alleged. However, CMA's petition does not include sufficient information which clearly demonstrates that CMA has relied on household data as that term is used for purposes of effective competition. For instance, the petition does not include a copy of the relevant tables or pages from the census data or even a citation to the relevant pages or tables within the census, so as to enable us to determine the accuracy of the claim.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[8] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within the franchise area.[9] We find that CMA has failed to meet this burden. CMA did not support its effective competition claim with adequate documentation. Our rules require the use of data reflecting the number of "households" in the franchise area.[10] Although CMA's petition makes an assertion about a particular number, it does not submit sufficient information upon which to determine that its effective competition claim is based on the precise factual information required. Accordingly, CMA's petition is denied.[11]

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[1] The County filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" on October 21, 1993, which became effective on November 20, 1993.

[2] 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or 4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. 47 C.F.R. § 76.905(a) and (b)(1).

[8] 47 C.F.R. § 76.906.

[9] 47 C.F.R. § 76.911(b)(1).

[10] In its *Third Order on Reconsideration*, the Commission noted that "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). The term "households" is defined for purposes of the 1990 Census to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, Summary Population and Housing Characteristics, CPH-1-1B, Appendix B at B-8.

[11] Should CMA wish to submit more specific information sufficient to demonstrate the presence of effective competition, it may submit such information by filing a petition for revocation pursuant to Section 76.914 of the Commission's Rules. *See* 47 C.F.R. § 76.914.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by CMA North Carolina Cable Associates, Limited Partnership challenging the certification of Pamlico County, North Carolina to regulate CMA's basic service cable rates IS DENIED.

6. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

7. IT IS FURTHER ORDERED that CMA North Carolina Cable Associates, Limited Partnership SHALL FILE the required rate justification on the appropriate forms with Pamlico County, NC within thirty days of the release of this *Memorandum Opinion and Order* or within thirty days of receipt of notice from the franchising authority that it is regulating CMA's rates.

8. This action is taken pursuant to delegated authority under §0.321 of the Commission's rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

STAR CABLE ASSOCIATES

Petition for Reconsideration

of the Certification of
Milton Township, Ohio
to Regulate Basic Cable Rates
(OH2069)

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 13, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 8, 1993, Star Cable Associates ("Star Cable") filed a timely petition for reconsideration challenging the certification of Milton Township, Ohio ("Milton Township") to regulate rates for basic cable service and associated equipment.[1] Milton Township did not file an opposition to Star Cable's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

II. DISCUSSION

3. Star Cable argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Milton Township, its franchise area.[7] Star Cable claims that it currently serves only 16 of the 966 households (that is, occupied housing units)[8] in its franchise area, or 1.6 percent of the total number of households. As supporting documentation, Star Cable provides 1990 Census data[9] which shows that there are 966 households in Milton Township.[10] Star Cable also submits a computer print-out with sufficient subscriber information to support its claim that it serves 16 households in the franchise area. Finally, Star Cable provides an affidavit by a responsible official certifying the accuracy of the data included in the petition.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within the franchise area.[12] Star Cable has met this burden. Star Cable appropriately relied on data reflecting the number of households as required by our rules.[13] Relying on this data, Star Cable has submitted sufficient evidence demonstrating that its cable system serving Milton Township, its franchise area, serves 16 of the 966 households, or 1.6 percent of the

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[1] Milton Township filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates aw P37IXPnd Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 12, 1993, which became effective on November 11, 1993.

[2] 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or 4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. 47 C.F.R. § 76.905(a) and (b)(1).

[8] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[9] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[10] Households in Craig Beach Village, an incorporated area within Milton Township, were excluded from this total. The appropriate franchise area does not include the village because the franchising authority is only permitted to contract with a cable company "with respect to the establishment or operation of a cable television system in the unincorporated area of the township[]." Ohio Rev. Code Ann. § 505.91 (Anderson 1992).

[11] 47 C.F.R. § 76.906.

[12] 47 C.F.R. § 76.911(b)(1).

[13] *Third Recon. Order, supra.*

households, within its franchise area. Thus, we find Star Cable's system serving Milton Township is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Star Cable Associates challenging the certification of Milton Township, Ohio to regulate basic cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Milton Township, Ohio to regulate Star Cable Associates' basic cable rates IS RESCINDED.

7. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INSIGHT COMMUNICATIONS COMPANY
OF NEW YORK, INC.

of the Certification of
the City of Greenfield, Indiana,
to Regulate Basic Cable Service Rates
(IN0716)

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 19, 1993, Insight Communications Company, of New York ("Insight") filed a timely petition for reconsideration challenging the certification of the City of Greenfield, Indiana, ("Greenfield") to regulate rates for basic cable service and associated equipment.[1] On August 18, 1994, Insight filed a supplement to its original petition, pursuant to a recent Commission Order.[2] Greenfield did not file an opposition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification 30 days from the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. Insight argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the City of Greenfield, Indiana, its franchise area.[8] Insight claims that it serves only 283 of the 4,525 "homes" in the franchise area, or 6.25 percent of the total number of homes. As supporting documentation, Insight submits a copy of a household trend report prepared by the National Planning Data Corporation which provides a 1992 estimate of 4,525 "housing units" in Greenfield. In addition, Insight provides a computer printout as of November 13, 1993, which indicates that it serves 283 subscribers.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[9] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[10] Based on all of the evidence before us, we find that Insight has met this burden.

5. Initially, we note that Insight based its arguments on incorrect housing data. Insight bases its effective competition claim on "housing unit" (occupied and vacant) data. Our rules, however, require the use of data reflecting the number of "households" (*i.e.*, occupied housing units) in the franchise area. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*).[11] Nonetheless, Insight's supplemental pleading does contain 1990 Census and 1992 estimated households (*i.e.*, occupied housing unit) data for the City of Greenfield, Indiana. This data indicates that there are 4,249 households (that is, occupied housing

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[1] Greenfield filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition on October 12, 1993. Its certification became effective on November 11, 1993.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[3] 47 U.S.C. § 543 (a)(4).

[4] 47 CFR § 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is not subject to effective competition. 47 C.F.R. § 76.910(b). *See* also 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Commission's rules provide that only the rates of cable systems that are subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of a cable system. 47 C.F.R. § 76.905(a) and (b)(1).

[9] 47 C.F.R. § 76.906.

[10] 47 C.F.R. § 76.911(b)(1).

[11] As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit". Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term reflects only occupied housing units. The term "housing unit", however, was defined by the Census Bureau to include both occupied and vacant housing units.

units) according to the 1990 Census and that there are 4,356 households (that is, occupied housing units) according to 1992 estimates. A comparison of the number of subscribers (283) in relation to either household figure (4,249) or (4,356) yields a penetration level of 6.66 percent or 6.50 percent, respectively. Thus, we find that Insight's cable system serving the City of Greenfield, Indiana is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Insight Communications Company challenging the certification of the City of Greenfield, Indiana, to regulate its basic cable service IS GRANTED.

7. IT IS FURTHER ORDERED that the certification granted to the City of Greenfield, Indiana, to regulate Insight Communications Company's basic cable rates IS RESCINDED.

8. This action is taken pursuant to delegated authority, Section 0.321 of the Commission's Rules, 47 CFR § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BROOKRIDGE CABLE SPECIAL PURPOSE PARTNERSHIP II, PARENT COMPANY OF OF BROOKSHIRE CABLE TV, L.P.

Petition for Revocation

of the Certification of
the City of Rhome, Texas,
to Regulate Basic Cable Service Rates (TX1069)

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On February 18, 1993, Brookridge Cable Special Purpose Partnership II, parent company of Brookshire Cable TV, L.P., ("Brookridge") filed a petition for revocation challenging the certification of the City of Rhome, Texas, ("Rhome")[1] to regulate rates for basic cable service and associated equipment.[2] Rhome did not file an opposition to Brookridge spetition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7] After the 30-day deadline for filing petitions for reconsideration has elapsed, cable operators may challenge the franchising authority's certification by filing a petition for revocation. However, regardless of its grounds, a petition for revocation does not automatically trigger a stay of the franchising authority's power to regulate basic rates.[8]

II. DISCUSSION

3. In its petition, Brookridge states that its system serving the City Rhome, Texas, is subject to effective competition because the system serves fewer than 30 percent of the homes within its franchise area.[9] Specifically, Brookridge states that it serves 46 subscribers in an area with 210 "homes" or 22 percent of the total number of "homes". Brookridge claims that its "homes" data is based on records provided by the City. However, it provides no underlying documentation to support its claim.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[10] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, exists in the franchise area.[11] We find that Brookridge had failed to meet this burden. Brookridge does not support its effective competition claim with any underlying documentation as the Commission requires.[12] Thus, we find that Brookridge has failed to demonstrate that its system serving the City of Rhome is subject to effective competition. Accordingly, its petition is denied.

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[1] Rhome filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition on November 15, 1993. Its certification became effective on December 15, 1993.

[2] Brookridge filed a pleading styled as a "petition for reconsideration." We note, however, that Rhome's certification was filed with the Commission on November 15, 1993, and became effective on December 15, 1993. Thus, a petition for reconsideration challenging Rhome's certification must have been filed no later than January 14, 1994. *See* 47 C.F.R.§§ 1.106, 76.911, Report and Order and Further Notice of Proposed Rulemaking, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693, (1993). Brookridge's petition was not filed until February 18,h)1994, more than one month after the period for filing petitions for reconsideration had elapsed. Because Brookridge's petition for reconsideration is untimely, it will be treated as a petition for revocation.

[3] 47 U.S.C. § 543 (a)(4).

[4] 47 CFR § 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; or (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] 47 C.F.R. § 76.914 (d).

[9] The Commission's rules provide that only the rates of cable systems that are subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of a cable system. 47 C.F.R. § 76.905(a) and (b)(1).

[10] 47 C.F.R. § 76.906.

[11] 47 C.F.R. § 76.911(b)(1).

[12] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

III. ORDERING CLAUSES

5. Accordingly, IT IS FURTHER ORDERED that the petition for revocation filed by Brookshire Cable Special Purpose Partnership II, parent company of Brookshire Cable TV, L.P., challenging the certification of the City of Rhome, Texas, to regulate its basic cable service IS DENIED.

6. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-148

In the Matter of

Amendment of Section 73.202(b), RM-8022
Table of Allotments,
FM Broadcast Stations.
(Ludlow, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 4, 1995; Released: January 12, 1995

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 7 FCC Rcd 4460 (1992), issued in response to a petition filed on behalf of Miracle Broadcasting ("petitioner") proposing the allotment of Channel 261B1 to Ludlow, California, as that community's second local FM service. Petitioner filed supporting comments in response to the *Notice*. Opposing comments were filed by KHWY, Inc. ("KHWY"), licensee of Station KHYZ(FM), Channel 258B, Mountain Pass, California,[1] to which petitioner responded. Reply comments were also filed individually by Kenneth B. Orchard ("Orchard"), KOLA, Inc. ("KOLA"), licensee of Station KOLA(FM), San Bernardino, California, and American Radio Brokers, Inc. ("ARBI").[2]

2. In response to the *Notice*, KHWY poses two objections to the proposed allotment of Channel 261B1 to Ludlow. First, KHWY claims that no technically feasible site is available at the restricted site or surrounding area to accommodate proposed Channel 261B1 at Ludlow and therefore, the allotment proposal should be denied. Specifically, KHWY asserts that the reference site for Channel 261B1 is located in a wilderness study area which is under the auspices of the Bureau of Land Management ("BLM") of the Department of the Interior. Accordingly, KHWY contends that construction of any kind in that area is prohibited.[3] Furthermore, KHWY asserts that once a substantial question has been raised concerning the availability of a technically feasible site that complies with the Commission's rules, in accordance with established precedence the proposal must be rejected, citing *Creswell, Oregon*, 3 FCC Rcd 4608 (1988) and *Pinckneyville, Illinois*, 41 RR 2d 69, 71 (1977). KHWY comments that as the restricted site is located on land under the jurisdiction of another federal agency, the Commission must confer with that agency prior to allocation to determine whether a given area is available, citing *Bay Shore, New York*, 25 FCC 2d 877, 881-82 (1970), and *San Clemente, California*, 50 FR 8326 (published March 1, 1985).

3. Secondly, KHWY claims that proposed Channel 261B1 would be subject to interference caused and received from grandfathered Station KOLA(FM), Channel 260B, San Bernardino, California.[4] [5] KHWY claims that although proposed Channel 261B1 at Ludlow complies with Section 73.207(b) of the Commission's Rules, the Commission has declined to make allotments that would create interference due to the presence of a grandfathered station, citing *Vallejo, California*, 40 RR 2d 648, 651-52 (1977), *affirmed* 44 RR 2d 375 (1978); *Muncie, Indiana*, 32 FCC 2d 839, 842-44 (1972), *reconsideration denied*, 38 FCC 2d 324 (1972). Consequently, KHWY urges that the proposed allotment of Channel 261B1 to Ludlow is defective and should be rejected. However, as a means of providing an additional FM outlet to Ludlow, KHWY suggests that Channel 243B1, or a Class A channel, could be allotted to Ludlow, and stated its intention to apply for such channel, if allotted.

4. In response to KHWY's claim of an unavailable site to accommodate the proposed allotment of Channel 261B1 to Ludlow, petitioner provided a letter from the Area Manager of the Needles, California, field office of the Bureau of Land Management stating that the BLM also administers public lands within the petitioner's area of interest that are not within the protected boundaries of the wilderness study area. Petitioner also provided a map to depict an area in which to locate Channel 261B1 at Ludlow. Petitioner comments that the Commission assumes the availability of sites on BLM land that are not subject to special protection, citing *Los Alamos, New Mexico*, 7 FCC Rcd 3249 (1992).

5. As to the alleged predicted interference that the proposed allotment of Channel 261B1 at Ludlow would cause to grandfathered Station KOLA(FM), Channel 260B, San Bernardino, California, and the potential predicted interference to KHYZ(FM), Channel 258B, Mountain Pass, California, petitioner comments that pursuant to Section 73.209(b) of the Commission's Rules, the degree of inter-

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[1] Commission records indicate that KRXV, Inc., rather than KHWY, Inc., is the licensee of Station KHYZ(FM), Channel 258B, Mountain Pass, California.

[2] The reply comments of Orchard, KOLA and ARBI were not served on the petitioner in violation of Section 1.420(c) of the Commission's Rules, and therefore they have not been accepted for consideration.

[3] KHWY provided a letter statement from the Acting Area Manager of the Needles, California, field office of the Bureau of Land Management, which indicates that as the site identified in the *Notice*, as well as the site specified by the petitioner in its proposal to accommodate the Ludlow proposal, are in a wilderness study area, the construction of radio facilities therein would be prohibited.

[4] Station KOLA(FM), operates with an effective radiated power (ERP) of 29.5 kilowatts at an antenna height of 507 meters. According to KHWY's engineering statement, based upon the use of maximum facilities for proposed Channel 261B1 at Ludlow (25 kW 100 meters) the interfering contour (51 dBu) from Station KOLA will overlap the protected contour (57 dBu) of proposed Channel 261B1 at Ludlow. And, the predicted interfering contour (48 dBu) of proposed Channel 261B1 at Ludlow would overlap the protected contour (54 dBu) of Station KOLA.

[5] KHWY also alleges that the proposed allotment of Channel 261B1 at Ludlow has a potential to cause interference to grandfathered Station KHYZ, Channel 258B, Mountain Pass, California, operating with an effective radiated power of 10.0 kilowatts at an antenna height of 521 meters.

ference protection afforded to permittees and licensees of FM broadcast stations is limited solely to the extent specified by the minimum distance separation requirements using maximum parameters for its class. Therefore, petitioner remarks that its proposal is consistent with current Commission procedures which allots fully-spaced channels notwithstanding potential interference to grandfathered stations.

6. As to KHWY's suggested allotment of Channel 243B1 to Ludlow as an alternative to Channel 261B1 at that community, petitioner's engineering statement notes that the closest reference site to accommodate Channel 243B1 is approximately 17 kilometers from the community, whereas Channel 261B1 can be allotted at a less restrictive site. Therefore, petitioner remarks that KHWY's alternate proposal is inferior and urges its rejection. In conclusion, petitioner requests that since its proposal meets the Commission's technical requirements, and KHWY has failed to rebut the presumption of available sites to accommodate its proposal, that Channel 261B1 be allotted to Ludlow as set forth in the *Notice*.

7. Initially, we address KHWY's assertion regarding the lack of a suitable transmitter site to accommodate the petitioner's proposal. Although KHWY presented a document from the BLM indicating that the reference site for proposed Channel 261B1 at Ludlow is in a wilderness study area, and therefore unavailable for the construction of radio facilities, the petitioner also produced a document from a BLM official stating that the agency also manages public land use areas in the petitioner's area of interest, that are not subject to any restrictions. Pursuant to our own independent inquiry, the staff has been informally advised by the BLM that there are indeed public land areas within those administered by it that are not within protected areas. Therefore, consistent with Commission precedent, the willingness of the BLM to entertain petitioner's request for use of the land under its jurisdiction is adequate to provide a reasonable assurance that a site meeting the Commission's technical requirements is available. *See Los Alamos, New Mexico, supra; see also, Nyssa, Oregon*, 5 FCC Rcd 7404 (1990).

8. With regard to KHWY's claim of interference that proposed Channel 261B1 would cause to Station KOLA(FM), San Bernardino, and the potential interference to Station KHYZ, Channel 258B, Mountain Pass, California, each of those facilities operate in accordance with Section 73.211 of the Commission's Rules. As early as 1962, the Commission addressed the extent of protection to be afforded to stations previously authorized to operate with maximum facilities exceeding those for their class.[6] It was determined that the only protection to which super powered stations would be entitled vis-a-vis new allotments is that provided by the minimum distance separation requirements as determined by the maximum power and antenna height parameters for its class. See Section 73.209 of the Commission's Rules. In formulating its protection standards, the Commission recognized that while such methodology could result in some derogation of existing service in some instances if new allotments were made at or near the minimum spacings, any resulting loss in service to an existing grandfathered station would be more than offset by the gain in over-all FM service resulting from that to be provided by the new allotment. Further, the Commission stated it did not believe the public interest would be served by perpetuating the advantage enjoyed by super-maximum stations, if it meant a restriction on the provision of new facilities. Therefore, KHWY's argument in this regard is without merit.[7]

9. Next, we turn to KHWY's suggested allotment of Channel 243B1 or a Class A channel to Ludlow as an alternative to Channel 261B1, either of which it states an intention to apply. In the interest of providing effective and efficient management of the frequency spectrum, and as a means of providing the public with the widest coverage area broadcast facility possible, the Commission will allot the highest class channel requested to a community that meets the technical provisions of our rules. Therefore, as it has been demonstrated that a Class B1 channel is available to Ludlow, we will not consider a Class A allotment.

10. As to KHWY alternate proposal to allot Channel 243B1 to Ludlow, it would require a site restriction 18.3 kilometers (11.4 miles) west of the community, whereas Channel 261B1 would be less restrictive. In determining compliance with Section 73.207(b) of the Commission's Rules, if a new proposed allotment requires a site restriction, the Commission will endeavor to impose that which is the least restrictive theoretical site from the intended city of license. *See Vacaville, California*, 4 FCC Rcd 8315 (1989), *recon. denied*, 6 FCC Rcd 143 (1991). Additionally, a staff engineering analysis indicates that due to a terrain obstruction, operation from the site required for Channel 243B1 would present a line-of-sight service problem to the community of Ludlow, in contravention of Section 73.315 of the Commission's Rules.

11. In view of the above, we believe the public interest would be served by allotting Channel 261B1 to Ludlow, California, since it could provide a second local FM service to that community.

Technical Statement

12. Channel 261B1 can be allotted to Ludlow consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules provided the transmitter is located at least 11.9 kilometers (7.3 miles) northeast[8] of the community

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective February 27, 1995, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Ludlow, California	261B1, 289A

[6] See, *First Report and Order*, Docket No. 14185, 40 FCC 662 (1962).

[7] KHWY reliance on *Vallejo, California* and *Muncie, Indiana, supra*, is inapposite as each proceeding concerned interference that a new allotment would create indirectly (based on multiple channel substitutions elsewhere to accommodate the allotment), to an existing station within its protected service contour from a grandfathered station.

[8] Coordinates used for Channel 261B1 are 34-47-31 and 116-03-56.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. The window period for filing applications for Channel 261B1 at Ludlow, California, will open on **February 27, 1995**, and close on **March 30, 1995**.

16. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process for Channel 261B1 at Ludlow, California, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-2

In the Matter of

Amendment of Section 73.202(b) RM-8502
Table of Allotments,
FM Broadcast Stations.
(Charlotte Amalie, Virgin Islands)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 4, 1995; Released: January 12, 1995

Comment Date: March 6, 1995
Reply Comment Date: March 21, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Virgin Islands Youth Development Radio, Inc., permittee of Station WIUJ(FM), Channel 275D, Charlotte Amalie, Virgin Islands ("petitioner"), proposing the allotment of Channel 275A at Charlotte Amalie and its reservation for noncommercial educational use, and the modification of its construction permit accordingly.[1] Although petitioner failed to state its intention to apply for the channel if allotted, petitioner rectified this omission in an amendment to the petition.[2]

2. In support of its proposal, petitioner states that the allotment of Channel 275A for noncommercial educational use at Charlotte Amalie would allow Station WIUJ(FM) to operate without interference to Station WIPR-TV, Channel 6, San Juan, Puerto Rico. According to petitioner, in 1977 its initial permit for Channel 205D was granted on the basis that the transmitter power output would not exceed 10 watts. However, terrain factors were not considered. In 1990, WIUJ(FM) requested a Special Temporary Authorization to operate on Channel 275D because of interference, which was denied. On March 5, 1992, Station WIUJ(FM)'s construction permit application (BPED-910506MI) for permanent operation on Channel 275D was granted. Station WIUJ(FM) began operating on program test authority on Channel 275D and on March 1, 1993, filed a license application (BLED-930301KG), which is pending.[3] By operating on Channel 275D, the interference was eliminated. However, petitioner claims that Station WIUJ(FM) cannot move back to the noncommercial educational band to achieve Class A status without causing excessive interference to Station WIPR-TV, which is in violation of Section 73.525 of the Commission's Rules. Moreover, petitioner contends that the very high HAAT of its site precludes reducing power to levels which would comply with the Commission's Rules. Petitioner states that there are no Class A channels available in the noncommercial educational band that would provide sufficient elevation in order to provide city grade coverage and also comply with the interference limitations of Section 73.525. Petitioner asserts that since Station WIPR-TV is reluctant to grant Station WIUJ(FM) an interference waiver, it can now only achieve Class A status in the commercial portion of the FM band. Petitioner further claims that the allotment of Channel 275A meets all technical requirements and the reservation of the channel for noncommercial educational use would permanently reserve Station WIUJ(FM)'s existing operation and would continue to provide effective Class A service to Charlotte Amalie and the island of St. Thomas.

3. Generally, noncommercial educational stations operate within the reserved portion of the FM band (Channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments or potential interference to operation on VHF Television Channel 6. Here, potential interference to Station WIPR-TV, Channel 6, San Juan, Puerto Rico, appears to justify the reservation of a channel in the nonreserved band (Channels 221-300) for noncommercial educational use. An engineering analysis has confirmed that there are no Class A channels available in the noncommercial educational band. Therefore, the allotment and reservation of a commercial channel appears to be the only way to provide a full Class A noncommercial educational channel to Charlotte Amalie.

4. We believe the public interest would be served by proposing the allotment of Channel 275A at Charlotte Amalie and to reserve the channel for noncommercial educational use, since it would provide the community with educational service. An engineering analysis has determined that Channel 275A can be allotted to Charlotte Amalie in compliance with the Commission's minimum distance separation requirements with a site restriction of 10. 6 kilometers (6.6 miles) west.[4]

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[1] We note that Station WIUJ(FM) is a Class D station and thus is a secondary service. Station WIUJ(FM)'s construction permit for Channel 275D at Charlotte Amalie cannot be modified in the context of a rule making proceeding. Rule making petitions must be filed pursuant to Section 1.401, *et seq.* of the Commission's Rules. However, petitioner filed an amendment acknowledging that although Station WIUJ(FM)'s Class D construction permit cannot be modified, it would still apply for Channel 275A if allotted and reserved for noncommercial educational use.

[2] Although the petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in the petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). The petitioner is requested to rectify this omission in its comments.

[3] Also pending is an application (BMPED-930902IA) to modify Station WIUJ(FM)'s construction permit.

[4] The coordinates for Channel 275A Charlotte Amalie are North Latitude 18-21-20 and West Longitude 65-01-45.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Charlotte Amalie, Virgin Islands	241B1, 246B, 250B, 271B, 282B, 287B	*226A,[5] 241B1, 246B, 250B, 271B, *275A 282B, 287B

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **March 6, 1995**, and reply comments on or before **March 21, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Leo Morone, President
Virgin Islands Youth Development Radio, Inc.
P.O. Box 2477
St. Thomas, Virgin Islands 00803
(Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

[5] We note that a petition was filed by Virgin Islands Public Television System requesting the allotment of Channel 226A at Charlotte Amalie and its reservation for noncommercial educational use. A *Notice of Proposed Rule Making* is issued concurrently to cover this proceeding (RM-8501)

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 95-1

In the Matter of

Amendment of Section 73.202(b), RM-8527
Table of Allotments,
FM Broadcast Stations.
(Hamilton, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 4, 1995; Released: January 12, 1995

Comment Date: March 6, 1995
Reply Comment Date: March 21, 1995

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Benedict Communications, Inc. ("petitioner"), seeking the allotment of Channel 251C3 to Hamilton, Montana, as that community's second FM broadcast service.[1] Petitioner submitted information in support of the proposal and stated its intention to file an application for Channel 251C3 if the channel is allotted to Hamilton.[2]

2. We believe petitioner's proposal warrants consideration. Channel 251C3 can be allotted to Hamilton, Montana, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[3] Since Hamilton is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be obtained for this allotment.

3. In view of the fact that the proposed allotment would provide a second local FM broadcast service to Hamilton, Montana, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hamilton, Montana	240C3	240C3, 251C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **March 6, 1995**, and reply comments on or before **March 21, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

James R. Bayes
James V. Haines
Wiley, Rein & Fielding
1776 K Street, N. W.
Washington, D.C. 20006

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

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[1] Petitioner is the licensee of Stations KLYQ(AM) and KBMG(FM), Hamilton, Montana.

[2] The Commission adopted new local ownership rules based on market size and audience share which enables petitioner to file an application for Channel 251C3 at Hamilton, if allotted. For stations in markets with fewer than 15 radio stations, a single licensee will be permitted to own up to three stations, no more than two of which are in the same service, provided that the owned stations represent less than 50 percent of the stations in the market. *See Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd 6387 (1992). Petitioner did not provide information showing it is eligible to acquire a third station at Hamilton, and is therefore requested to do so in its comments.

[3] The coordinates for Channel 251C3 at Hamilton are 46-14-36 and 114-09-30.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies' Cost Allocation Manual Revisions to Utilize a Statistical Sampling Process for Technician Time Reporting	AAD 94-59

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 1995; Released: January 12, 1995

By the Chief, Accounting and Audits Division:

1. On April 29, 1994, the Ameritech Operating Companies ("Ameritech")[4] filed revisions to their cost allocation manual ("CAM") to utilize a statistical sampling process for technician time reporting. Ameritech proposed this process, which it refers to as Enhanced Time Distribution Process ("ETDP"), to replace its positive time reporting for assigning certain technician expenses to accounts and cost pools. Under positive time reporting, all technicians prepare time reports while under ETDP, only a sample group of technicians file time reports. Section 64.903(b) of our rules[5] required Ameritech to quantify, as part of its CAM filing, the impact ETDP would have on its cost apportionment results. Ameritech attempted to estimate that impact by comparing results under both positive time and ETDP reporting for January and February 1994. Ameritech estimated that the implementation of ETDP would shift $9.6 million from nonregulated to regulated operations annually.[6]

2. From Ameritech's submission, it appeared that most of the $9.6 million shift to regulated operations was attributable to an increase of $12.8 million in the regulated portion of Account 6534, Plant operations administration expense. Ameritech claimed that most of this increase was the result of Ameritech technicians' incorrectly reporting their nonproductive time under positive time reporting. While such a reporting error may have explained why ETDP would increase the balance in Account 6534, Ameritech could not explain why 90 percent of the increase would be assigned to regulated operations. As a result, the Accounting and Audits Division issued an Order on August 8, 1994, conditionally approving Ameritech's ETDP process, but capping the regulated amounts in Account 6534 at the levels recorded for 1993 pending further study by Commission staff.[7] The Order instructed Ameritech not to make any changes to its ETDP system without prior notification and approval of the Commission and required the review of ETDP to be made part of the overall CAM review conducted annually by the independent auditors under Part 64.904 of the Commission's rules.[8]

3. After release of the *Ameritech ETDP Order*, the Commission staff reviewed the company records that had led Ameritech to estimate that ETDP would increase its regulated costs by $9.6 million annually. As part of that review, the staff compared the technicians' activity logs reported under positive time reporting with the corresponding activity logs reported under ETDP. This comparison revealed that in estimating the effects of ETDP, Ameritech had failed to include any nonproductive time in its positive time reporting results for Accounts 6534 in Illinois and Michigan. This error made it appear as though nonproductive time reported under positive time reporting was significantly less than under ETDP. Correcting this error changed the $9.6 million annual shift to regulated activities under ETDP to a $0.4 million shift to nonregulated activities.

4. Based on the above, we are removing the restriction related to the capping of the regulated amounts in Account 6534 at the levels recorded for 1993. However, we caution Ameritech that it is responsible for the accuracy of all data submitted to the Commission. We also remind Ameritech that it has the burden to fully explain and justify the data reported. We intend to review carefully Ameritech's Joint Cost Report (43-03) for 1994, especially to examine the relationship of its regulated and nonregulated costs. We expect that the relationship of regulated and nonregulated portions of Account 6534 will be similar to the results for this account in 1993. If not, Ameritech must fully explain why the relationship of the regulated and nonregulated portions of Account 6534 has changed since 1993. We remind Ameritech that the other requirements specified in the *Ameritech ETDP Order* remain in effect.

5. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j) and 220 of the Communications Act, as amended, 47 U.S.C. §§154(i), 154(j) and 220, and Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91 and 0.291, that restrictions to Ameritech's Account 6534 ARE REMOVED as stated above.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

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[4] The Ameritech Operating Companies are Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

[5] 47 C.F.R. §64.903(b).

[6] Ameritech CAM Revision, Exhibit A (April 29, 1994).

[7] Ameritech Operating Companies' Cost Allocation Manual Revisions, *Memorandum Opinion and Order*, 9 FCC Rcd 4024 (Accounting and Audits Div. 1994) (*Ameritech ETDP Order*).

[8] 47 C.F.R. §64.904.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PRODUCTIVE TRANSPORTATION SERVICES, INC. and

TIMOTHY J. O'CONNELL
Complainant,

v.

MCI TELECOMMUNICATIONS SERVICES,
Defendant.

File No. E-94-075

ORDER

Adopted: December 30, 1994; Released: January 12, 1995

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On July 25, 1994, co-complainants Productive Transportation Services, Inc. and Timothy J. O'Connell (collectively "Productive") filed the above-captioned complaint against MCI Telecommunications Services (MCI) seeking a determination that MCI had unlawfully demanded that Productive pay non-usage sensitive minimum charges for "800" service and requesting that the Commission assess forfeitures on MCI for its unlawful actions. On December 20, 1994, however, Productive and MCI filed a joint motion requesting that the complaint be dismissed with prejudice. In support of the motion, the parties state that a mutually agreeable settlement has been reached.

2. We are satisfied that granting the parties' joint motion to dismiss will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE SAVERS, INC.
Complainant,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., d/b/a SOUTH CENTRAL BELL TELEPHONE COMPANY,
Defendant.

File No. E-94-81

ORDER

Adopted: December 30, 1994; Released: January 12, 1995

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On August 19, 1994, Long Distance Savers, Inc. (LDS) filed the above-captioned complaint against BellSouth Telecommunications, Inc. (BellSouth) alleging violations of Sections 201 and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201-202. On December 2, 1994, however, LDS and BellSouth filed a joint motion to dismiss the complaint with prejudice. In support of the motion, the parties state that a mutually agreeable settlement has been reached.

2. We are satisfied that granting the parties' joint motion to dismiss will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 208, and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

THE LIVINGSTON RADIO COMPANY — File Nos. BPH-891220IA, BPH-920325IE

For Construction Permit
to Modify the Facilities of
Station WHMI-FM, Howell, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: December 14, 1994; Released: January 12, 1995

By the Commission:

1. The Commission has before it the December 10, 1990 petition for reconsideration filed by The Livingston Radio Company ("Livingston") requesting reexamination of the Mass Media Bureau's ("Bureau") October 30, 1990 dismissal of its application (file no. BPH-891220IA) to modify the licensed facilities of Station WHMI-FM, Howell, Michigan.[1] In addition, this decision addresses Livingston's subsequent minor change application (BPH-920325IE), filed March 25, 1992.[2]

2. By way of background, WHMI-FM is licensed to operate on Channel 228A with an effective radiated power (ERP) of 3.0 kW and an antenna height above average terrain (HAAT) of 91.0 meters. The station is currently short-spaced to second-adjacent channel Class B station WLTI-FM, Detroit, Michigan and third-adjacent channel Class B station WIBM-FM, Jackson, Michigan.[3] On December 20, 1989 Livingston filed minor change application BPH-891220IA to increase its ERP to 6.0 kW and its HAAT to 96 meters at its present site. Livingston asserted in the application that, pursuant to 47 C.F.R. § 73.207, it was permitted to modify its facility from the presently licensed parameters up to the maximum permitted for a Class A station (6.0 kW ERP/100 meters HAAT), provided that the proposed increase did not exacerbate the existing short-spacings to WLTI and WIBM. These existing short-spacings, states Livingston, were created as a result of an increase in the Class A spacing requirements adopted by the *Report and Order* in Docket 80-90, 94 FCC 2d 152, 48 Fed. Reg. 29496 (1983). Because the *Second Report and Order* in Docket 88-375, 4 FCC Rcd 6375 (1989), which adopted the higher 6.0 kW power limit for Class A stations, did not increase the spacing requirements between Class A and second- and third-adjacent channel Class B stations, WHMI-FM concludes that it is permitted to increase to maximum Class A facilities at its present site.

3. The Bureau's October 30, 1990 dismissal letter responded by stating that the increase in spacing requirements in the *Report and Order* in Docket 80-90 was adopted when the maximum parameters for Class A stations were limited to 3.0 kW ERP/100 meters HAAT. Further, the Bureau indicated that the *Second Report and Order* in Docket 88-375 did not contemplate any power increases for stations not meeting the spacing requirements prior to the October 2, 1989 effective date of the revised Class A spacing requirements; because WHMI-FM was not fully spaced under the "old" (pre-October 2, 1989) spacing rules, it was limited to maximum facilities of 3.0 kW ERP/100 meters HAAT. Since the application proposed facilities in excess of that limit, it was dismissed as unacceptable for filing.

4. In its petition for reconsideration, Livingston continues to maintain that the application was in compliance with 47 C.F.R. § 73.207, since no change in the existing short-spacings was proposed.[4] Livingston also contends that neither the fact that provisions of BC Docket 80-90 were adopted when the maximum Class A ERP was 3 kW nor the fact that the *Second Report and Order* contained no explicit provision for power increases for short-spaced Class A stations "provide any guidance whatsoever" regarding whether such stations which became short-spaced under BC Docket 80-90 were barred from 6.0 kW/100 meter HAAT operation. Rather, states Livingston, "had the Commission determined to bar 6 kW power increases to Class A stations that became short-spaced by virtue of BC Docket 80-90, it had ample opportunity to so state." Petition at 6. Livingston also holds that the staff's dismissal was contrary to the action approved by the Commission in *Beasley Radio Company*, 4 FCC Rcd 6344 (1989), and the staff's interpretations given by Bureau staff members in a discussion concerning the 6.0 kW power increases with the Association of Federal Communications Consulting Engineers ("AFCCE") in December of 1989.[5] Therefore, Livingston believes that reinstatement and grant of application BPH-891220IA are warranted.

5. We disagree. With respect to Livingston's argument concerning the lack of a specific statement addressing the power and height maxima of stations with short-spacings

[1] In view of the issues presented in the petition, the matter has been referred by the Bureau to the Commission pursuant to 47 C.F.R. § 1.106(a)(1).

[2] Pursuant to 47 C.F.R. § 73.3519(b), this latter proposal may not be considered until after WHMI-FM's petition for reconsideration has been addressed. By letter dated June 1, 1992, WHMI-FM requested dismissal of the petition for reconsideration if modification application BPH-920325IE is also granted. For the reasons set forth below, we will address *seriatim* both the petition for reconsideration and the March 25, 1992 modification application.

[3] 47 C.F.R. § 73.207 requires WHMI to be spaced at least 69 km from WLTI and WIBM-FM, whereas the actual spacings are 64.3 km and 66.9 km, respectively.

[4] WHMI-FM cites 73.207(a), which states in pertinent part:

> applications to modify the facilities of stations with short-spaced antenna locations authorized pursuant to prior waivers of the distance separationh) requirements may be accepted, provided that such applications propose to maintain or improve that particular spacing deficiency.

[5] Livingston states that AFCCE members were told at that meeting that stations "short-spaced under the pre-October 2, 1989 rules for any reason *other* that the fact that they were authorized prior to 1964, 'have the right to go to full power for [their] class and all the rights associated with [their] class.'" Petition, at 12.

created by Docket 80-90, we note that at the time Livingston's original application (and later the petition for reconsideration) was filed, the *Second Report and Order* in Docket 88-375 was still subject to petitions for reconsideration and clarification. In disposing of those petitions, the Commission expressly addressed the issue raised by Livingston in its application. We held that those stations with short-spacings created on or after November 16, 1964 (excluding short-spacings created after October 1, 1989) are governed by the provisions of 47 C.F.R. § 73.213 (c). *Memorandum Opinion and Order* in Docket 88-375, 6 FCC Rcd 3417, 3422 (1991). Under this section, WHMI-FM is permitted to increase to 6 kW ERP/100 meters HAAT provided that it submitted exhibits demonstrating the consent of the short-spaced stations to a grant and the increase is consistent with the public interest. The exhibit must consist of a letter (or other suitable document) from the affected parties acknowledging the proposed modification and indicating that it is not objectionable. *Memorandum Opinion and Order*, 6 FCC Rcd at 3419. Since no such exhibits have been provided, WHMI-FM may not modify its facilities to operate above the 3 kW ERP/100 meters HAAT standard. Contrary to Livingston's statements, 47 C.F.R. § 73.207(a) simply states that applications to modify the facilities of stations with existing short-spacings may be accepted, without reference to the maximum parameters permitted for such a station. Since it deals with spacing only, acceptance under the provisions 47 C.F.R. § 73.207 does not excuse noncompliance with the Commission's other technical provisions, including the limitations on power and antenna height.[6] No other rule permits short-spaced Class A stations not in compliance with either 47 C.F.R. § 73.213(c)(2) (requiring consent of the affected stations) or 47 C.F.R. §73.215 (the Commission's contour protection standards) to increase to maximum Class A facilities of 6.0 kW ERP/100 meters HAAT.

6. Moreover, we find that *Beasley Radio Company* is inapposite to the case at hand. That decision involved a Class B station attempting to increase to maximum facilities in keeping with then 47 C.F.R. § 73.211, which at the time permitted a short-spaced station to increase to the maximum power and height permitted for its class. In contrast, the present case involves a situation in which the specific maximum power limit of 47 C.F.R. § 73.211 for class A stations, as well as the general requirements for increasing facilities by short-spaced stations, have been dramatically changed by MM Docket 88-375. Finally, with respect to the staff's discussion with AFCCE about the 6 kW rules, we note that "it is the obligation of the interested parties to ascertain facts from official Commission records and files and not rely on statements or informal opinions by the staff." *See Texas Media Group, Inc.*, 5 FCC Rcd 2581, 2582 (1990), *appeal denied sub nom. Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991).[7] Accordingly, we find that the Bureau's October 30, 1990 dismissal of application BPH-891220IA was proper. The petition for reconsideration therefore will be denied below.

7. We now consider Livingston's subsequent minor change application, file no. BPH-920325IE. That application also proposes operation from the present transmitter site with maximum Class A facilities of 5.0 kW ERP/110 meters HAAT. An informal objection to the application was filed on April 30, 1992 by Viacom International, Inc. ("Viacom"), licensee of WLTI, Detroit, MI.

8. In this proposal, Livingston notes that no objection was ever filed against the earlier application by either WLTI or WIBM. Livingston also reports that its counsel held telephone conversations with counsel for WLTI and WIBM in which those stations indicated that they preferred not to sign an agreement permitting WHMI-FM to increase its facilities. The present application also claims that a "critical need" exists for the power increase to overcome "considerable interference" from existing superpowered stations. Livingston states the WHMI(AM) and WHMI(FM) are the only stations licensed to Livingston County, with WHMI(AM) being forced to leave the air at night in order not to interfere with other AM stations. Further, WHMI-FM's signal allegedly is "unreliable" in the southeastern portion of Livingston County, home to half of the county's population. Two letters from police forces serving the county are provided in support of WHMI-FM's effort to improve its signal. Livingston also states that WHMI-FM is a primary source for information when tornados or severe storms threaten.

9. Viacom states in its informal objection that Livingston has erroneously implied that, by not filing an informal objection to application BPH-891220IA, it has acquiesced to Livingston's proposal. Viacom also argues that "public safety concerns cannot be properly transformed into means by which to circumvent Commission rules [such as 47 C.F.R. § 73.213(c)] that protect stations such as WLTI" from increased interference, as 47 C.F.R. § 73.213(c) is designed to do. Informal objection, at 3. Viacom further urges the Commission not to waive the requirement that written consent be submitted to demonstrate compliance with 47 C.F.R. § 73.213(c)(2), and requests dismissal of the application. In response to Viacom's informal objection, Livingston calls the increase in interference within WLTI's 54 dBu protected service area *de minimis*, by its calculation an increase of from 0.7 square miles to 2.0 square miles.

10. We have concluded, based upon our review of this matter, that Livingston's application should not be granted. This application, which does not propose to change transmitter site, is therefore subject to the same spacing requirements as Livingston's original proposal. The purpose of 47 C.F.R. § 73.213(c) is to prevent increased interference form existing short-spaced FM stations. This application would increase the existing interference areas to WLTI and WIBM-FM, which is contrary to the stated intent of the Commission in MM Docket No 88-375. *See e.g., Second Report and Order*, 4 FCC Rcd at 6381. Ass noted by Viacom, Livingston has not secured the consent of WLTI to permit a unilateral increase by WHMI-FM, nor apparently does it have the consent of WIBM-FM. By Livingston's own statement, the licensees of these two stations were

[6] The *Second Report and Order* indicated that all stations becoming short-spaced pursuant to BC Docket 80-90 are governed solely by newly promulgated Section 73.213(c). Class A stations broadcasting with no more than 3 kW ERP/100 meters HAAT were permitted, under that section, "to modify or relocate ... newly grandfathered Class A stations *that do not increase power above the current limit* ...." 4 FCC Rcd at 6381. Section 73.207 merely states that applicants may modify their short-spaced stations so long as no spacing deficiency is exacerbated.

[7] Moreover, the portion of the discussion with the AFCCE provided in the petition for reconsideration did not address with any particularity a specific situation.

unwilling to give such consent. Written consent is an essential predicate under Section 73.213(c)(2) to grant of Livingston's application. Moreover, the lack of an opposition before the Commission from either of these parties cannot be construed as assent.

11. With respect to Livingston's statement that the increased facilities are necessary to overcome interference from "superpowered stations," we note that no such station exists.[8] Short-spaced station WLTI and WIBM-FM operate within the power/antenna height limits of 47 C.F.R. § 73.211. Two additional short-spaced Canadian station--CKLW-FM, Windsor, Ontario and CBCL-FM, London, Ontario--operate within the framework of the treaty between the U.S. and Canada governing FM operations in the border zone and do not cause objectionable interference to WHMI-FM. WHMI-FM's licensed facility continues to be afforded the same protection from interference to which the station is entitled under the Commission's rules. With respect to the severe weather and public service considerations raised by Livingston, we note that WHMI-FM is not an only local service, as it attempts to show, nor is it the only station capable of providing emergency and public service information to Livingston County.[9] We believe that waiving our core technical rules standards on the basis of non-technical considerations (e.g., local service, public service reasons) would tend to undermine the FM allocations system as a whole and will not be undertaken absent truly compelling circumstances. Such circumstances do not exist in this case. *See North Texas Media, Inc. v. FCC*, FCC 84-456, *aff'd*, 59 RR 2d 605 (D.C. Cir. 1985); *ICBC Corp. v. FCC*, 716 F.2d 926 (D.C. Cir. 1983).

12. In light of the foregoing, the petition for reconsideration filed by Livingston against the dismissal of application BPH-891220IA IS DENIED. In addition, the informal objection by Viacom International Inc. against application BPH-920325IE IS GRANTED to the extent indicated, and application BPH-920325IE IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[8] We also note that, according to the staff's evaluation, no objectionable interference occurs within WHMI-FM's protected 60 dBu contour.

[9] Pursuant to longstanding practice, AM and FM stations are considered to be joint components of a single aural medium. *Memorandum Opinion and Order*, Docket 88-526, 5 FCC Rcd 7094, 7097 (1990); *FM Channel Policies/ Procedures*, 90 FCC 2d 88, 92 (1982). WHMI-FM, although the sole FM station licensed within Livingston County, cannot be considered the only local aural service due to the presence of WHMI. Additionally, Howell lies within the principal community contour of stations WHFB-FM, Benton Harbor, Michigan, and WAUS(FM), Berrien Springs, Michigan, as well as AM stations WJR, Detroit, and WTKA, Ann Arbor (daytime only). The number of receivable signal serving the Howell area will, of course, be significantly larger.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Fouce	CSR-4266-M
Amusement Enterprises, Inc.	CA1450
against Apollo CableVision, Inc.	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: December 31, 1994; Released: January 13, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On May 31, 1994, Fouce Amusement Enterprises, Inc., licensee of Television Broadcast Station KRCA (Ind., Channel 62), Riverside, California, filed a "Complaint" against Apollo Enterprises, Inc. ("Apollo"), operator of a cable television system serving Cerritos, California. Apollo filed an "Opposition" to this complaint on July 7, 1994, in response to which, KRCA filed its "Reply Of KRCA (TV) To Complaint and Request for Expedited Action" on July 18, 1994.

SUMMARY OF PLEADINGS

2. According to KRCA, it is a commercial television broadcast station entitled to mandatory carriage by the cable system serving Cerritos, pursuant to Section 76.55 of the Commission's Rules, since both Riverside and Cerritos are within the Los Angeles, California area of dominant influence (or "ADI"). KRCA adds that the Cerritos system presently transmits only 11 other commercial stations entitled to must-carry status and that, since it has at least 42 activated channels, it is able to add KRCA immediately. However despite numerous requests, Apollo has not done so, claiming that to do so, would be ". . . at the expense of breaching a contract with another programmer or at the expense of 'kicking off' of our line-up some other programming which is well-loved by our subscribers." KRCA states that this is not a valid basis for denying a local commercial station its right to mandatory signal carriage.

3. In response, Apollo states that it is actually limited to using 39 channels on the Cerritos system, pursuant to its lease with GTE Telephone, although it adds that the system has 78 channels, including 3 which are utilized by the City of Cerritos itself. Apollo states that all its channels are presently in use,[1] but that it had anticipated that it would be able to accommodate several carriage requests, including KRCA's, because it had planned to acquire Channels 40-79 from GTE, pursuant to their prior contractual arrangements.[2] However, Apollo notes that ". . . intervening civil and FCC proceedings had forestalled that expansion of capacity." Therefore, Apollo urges that the Commission defer carriage of KRCA, pending resolution of GTE's tariff proposals (Transmittals No. 873 and 874), or at least until December 31, 1994.[3]

4. In reply, KRCA asks that the Commission require Apollo add its station to the system no later than September 1, 1994, since it presently only transmits 11 local commercial stations, although the system's channel line-up as of January 5, 1994, demonstrated that it has, in fact, 42 useable activated channels, and it is therefore required to devote up to 14 local channels to carriage of local commercial stations. KRCA adds that the 3 channels utilized by the City of Cerritos count as part of the system's activated capacity, pursuant to Sections 76.5(nn) and (oo) of the Commission's Rules, so that even if, as Apollo claimes, it can only use 39 of the system's 78 channels, it still is required to carry up to 13 local commercial stations.

DISCUSSION

5. When the Commission adopted its *Report and Order* in MM Dockets No. 92-259, 90-4, and 92-295, 8 FCC Rcd 2965, 2972 (1993), it specifically addressed the issue of inadequate activated channel capacity and noted: "(*i.e.*: a cable operator without a sufficient number of available channels may be required to drop a non-must-carry station or cable programming service to fulfill its must-carry obligations)." In addition, Section 76.56(b)(2) of the Commission's Rules, requires that cable systems with more than 12 useable activated channels devote up to 1/3 of them to retransmission of local commercial television broadcast signals. In n.78 to its *Report and Order*, 8 FCC Rcd at 2972, the Commission explained that systems are allowed to round to the nearest whole number to determine how many channels must be devoted to the transmission of local commercial signals, in addition to any

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[1] In a letter dated May 3, 1993, to KRCA, Apollo's President, Tom Robak, stated that the Cerritos system had 36 activated channels, plus three other channels reserved for use by the City of Cerritos, and that it currently transmitted the following ten television broadcast stations licensed to Los Angeles: KCET (Educ., Ch. 28); KCBS-TV (CBS, Ch. 2); KNBC-TV (NBC, Ch. 4); KABC-TV (ABC, Ch. 7); KTTV (Ind., Ch. 11); KCAL (Ind., Ch. 9); KTLA (Ind., Ch. 5); and KCOP (Ind., Ch. 13); as well as KHSC (Ind., Ch. 46), Ontario, California; and KSCI (Ind., Ch. 18), San Bernardino, California.

[2] In the same letter to KCRA dated May 3, 1993, Mr. Robak states that the following six commercial California stations, in addition to KRCA, qualify for mandatory carriage on the Cerritos system, but that it currently lacks the channel capacity to add any of them: KMEX-TV (Ind., Ch. 34), Los Angeles; KDOC-TV (Ind., Ch. 56), Westminster; KTBN-TV (Ind., Ch. 40), Fontana; KAGL (Ind., Ch. 30), Los Angeles; KVEA (Ind., Ch. 52), Corona; and KWHY-TV (Ind., Ch. 22), Los Angeles.

[3] Apollo maintains that its attempts to obtain additional channel capacity on its system, which would allow it to carry KRCA, have been stymied by pending litigation and administrative proceedings. Essentially, Apollo asks for a temporary stay of the Commission's signal carriage rules pending resolution of the outstanding proceedings. Apollo's request is without merit for the very simple reason that it currently has the necessary channel capacity to commence carriage of KRCA consistent with the Commission's carriage rules. *See* para. 6 *infra*.

noncommercial signals that systems must also transmit. According to Apollo, it has a 39 channel system, including the 3 channels which it says are reserved for the exclusive use of the City of Cerritos. Therefore, as KRCA notes, the Commission's Rules require that up to 13 of Apollo's channels must be devoted to the transmission of local commercial signals, although KRCA's unrefuted allegation is that Apollo actually only carries 11 local commercial signals at present, and Apollo's own letter of May 3, 1993 indicated that it then only transmitted nine such signals. Consequently, we conclude that Apollo is not currently utilizing the required 1/3 of its capacity for the carriage of must-carry stations. Also, as noted above, the fact that Apollo may have to drop television broadcast stations or satellite delivered programming services that do not have mandatory carriage rights is not grounds to deny KRCA its right to mandatory carriage.

ORDERING CLAUSES

6. In view of the foregoing, we find that grant of KRCA's complaint is in the public interest.

7. Accordingly, IT IS ORDERED, That the "Complaint" (CSR-4266-M), filed May 31, 1994, by Fouce Amusement Enterprises, Inc. IS GRANTED in accordance with Section 614(d)(3) (47 U.S.C. 534) of the Communications Act of 1934, as amended.

8. IT IS FURTHER ORDERED That Apollo Enterprises, Inc. SHALL CARRY the signal of KRCA on its cable television system serving Cerritos, California, in compliance with this Order, within forty-five (45) days of its release date. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Apollo CableVision, Inc.	CSR-4268-M
Cerritos, California	CA-1450

Request for Waiver

MEMORANDUM OPINION AND ORDER

Adopted: January 5, 1995; Released: January 13, 1995

By the Cable Services Bureau:

INTRODUCTION

1. On June 2, 1994, a "Petition For Special Relief" was filed by Apollo CableVision, Inc. ("Apollo"), operator of a cable television system serving Cerritos, California. In response, an "Opposition To Petition For Special Relief" dated June 21, 1994, was submitted by GTE Service Corporation ("GTE"), to which Apollo responded on July 1, 1994. In addition, Fouce Amusement Enterprises, Inc., licensee of Television Broadcast Station KRCA (Ind., Channel 62), Riverside, California, filed an opposition on July 18, 1994.

SUMMARY OF PLEADINGS

2. In its petition, Apollo argues that it is presently precluded from adding KRCA to its system since it only programs 36 of the system's 78 video channels, plus 2 additional signals on the system's FM spectrum. Three of the remaining channels are programmed by the City of Cerritos, according to Apollo, and 39 channels are programmed by GTE California Incorporated, through its affiliate, GTE Service Corporation. Moreover, Apollo notes that all of its 36 channels have been fully occupied since 1988, and that its anticipated utilization of the system's other 39 channels has been stymied by pending civil and administrative proceedings,[1] which Apollo hopes will soon be concluded, thus enabling it to add both certain commercial television stations (including KRCA), as well as other channel services. Therefore, Apollo requests a temporary waiver of the Commission's must-carry rules, until December 31, 1994, with the opportunity to request a further extension of that period for good cause, should the pending matters now preventing its compliance with KRCA's carriage request still not be resolved.

3. In its opposition, GTE argues that Apollo should be required to add KRCA to its existing 39 channel system since, in fact, it has no automatic right to program the 39 channels presently used by GTE Service Corporation; it only has a "right to first refusal" of those channels in the event that "bandwidth capacity in excess of 275 MHz should become available." According to GTE, Apollo is attempting to acquire immediate use of these channels at an unreasonable price in pending litigation,[2] but "Service Corporation has indicated absolutely no intention to divest itself of its right to these channels. Thus, under any interpretation, these channels are not 'available' within the meaning of Apollo's contractual 'right of first refusal.'"

4. In reply, Apollo notes that GTE does not contest the fact that its present channel capacity is fully utilized or that the pending litigation has prevented it from adding any additional signals, including KRCA's. Apollo asks that the Commission strike GTE's opposition, which it characterizes as procedurally inappropriate and substantively inconsequential. In addition, Apollo cites a letter dated June 29, 1993, to it from GTE Telephone noting that the FCC waiver would terminate in July 1994, and offering Apollo the right of first refusal then since ". . .275 MHz of broadband capacity. . . will become available. . . ."

5. In its opposition, KRCA notes that Apollo's must-carry obligation does not depend upon it having vacant activated channels, citing the *Report and Order* in MM Dockets No. 92-259, 90-4, and 92-295, 8 FCC Rcd 2965, 2988 (1993), in which the Commission stated: "Congress created a clear statutory right of carriage and channel position that applies prospectively notwithstanding the existence of prior agreements between cable operators and cable programming services." (footnote omitted) Moreover, according to KRCA, Apollo is now obligated to retransmit 14 commercial must-carry stations, and it will be obligated to carry up to 26 such stations, if it receives permission to program the other 39 channels on the Cerritos system. Finally, KRCA cites its prior "Complaint," which was filed with the Commission May 31, 1994, and states that Apollo should have no additional extensions of time to comply with its mandatory carriage obligations.

DISCUSSION

6. As we noted in the companion case to this decision, previously referenced by KRCA,[3] when the Commission adopted its *Report and Order* in MM Dockets No. 92-259, 90-4, and 92-295, 8 FCC Rcd 2965, 2972 (1993), it specifically addressed the issue of inadequate activated channel capacity and noted: "(*i.e.*: a cable operator without a sufficient number of available channels may be required to drop a non-must-carry station or cable programming service to fulfill its must-carry obligations)." In addition, Section 76.56(b)(2) of the Commission's Rules, requires that cable systems with more than 12 useable activated channels devote up to 1/3 of them to retransmission of local com-

[1] Apollo maintains that its attempts to obtain additional channel capacity on its system, which would allow it to carry KRCA, have been stymied by pending litigation and administrative proceedings. Essentially, Apollo asks for a temporary stay of the Commission's signal carriage rules pending resolution of the outstanding proceedings. Apollo's request is without merit for the very simple reason that it currently has the necessary channel capacity to commence carriage of KRCA consistent with the Commission's carriage rules. *See* para. 6 *infra*.

[2] *Apollo CableVision, Inc. v. GTE California Incorporated*, No. CV 94-2929 SVW (EEX) (C.D. Cal., filed April 7, 1994, removed May 5, 1994).

[3] *Complaint of Fouce Amusement Enterprises, Inc. against Apollo CableVision, Inc. (CSR-4266-M), filed May 31, 1994.*

mercial television broadcast signals. In n.78 to its *Report and Order*, 8 FCC Rcd at 2972, the Commission explained that systems are allowed to round to the nearest whole number to determine how many channels must be devoted to the transmission of local commercial signals, in addition to any noncommercial signals that systems must also transmit. According to Apollo, it has a 39 channel system, including the 3 channels which it says are reserved for the exclusive use of the City of Cerritos. Therefore, as KRCA notes, the Commission's Rules require that up to 13 of Apollo's channels must be devoted to the transmission of local commercial signals, although KRCA's unrefuted allegation is that Apollo currently carries fewer than 12 local commercial signals. Consequently, we conclude that Apollo is not currently utilizing the required 1/3 of its capacity for the carriage of must-carry stations. Also, as noted above, the fact that Apollo may have to drop television broadcast stations or satellite-delivered programming services that do not have mandatory carriage rights is not grounds to deny KRCA its right to mandatory carriage.

ORDERING CLAUSES

7. In view of the foregoing, we find that grant of Apollo's request is not in the public interest.

8. Accordingly, IT IS ORDERED, That the "Petition For Special Relief" (CSR-4268-M), filed June 2, 1994, by Apollo CableVision, Inc. IS DENIED in accordance with Section 614(d)(3) (47 U.S.C. 534) of the Communications Act of 1934, as amended. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-424

In re Applications of

WESTERN CITIES BROADCASTING, INC.	File No. BRH-891201XU
For Renewal of License Longmont, Colorado	
AMADOR S. BUSTOS	File No. BPH-900228MB
LONGMONT BROADCASTING CORPORATION	File No. BPH-900216MA
For Construction Permit Channel 282C1 Longmont, Colorado	
WESTERN CITIES BROADCASTING, INC.	File No. BPH-890104KC
For License to Cover Minor Changes Station KQKS(FM) Longmont, Colorado	

MEMORANDUM OPINION AND ORDER

Adopted: January 6, 1995; Released: January 13, 1995

By the Commission:

1. We have before us a Motion for Special Relief and Expedited Action jointly filed on July 7, 1994 by Longmont Broadcasting Corporation (LBC) and Amador S. Bustos and oppositions thereto filed on July 18 by Western Cities Broadcasting, Inc. and the Chief of the FCC's Mass Media Bureau. The petitioners ask us to order the ALJ presiding in this case to proceed at once to prepare and issue a partial initial decision resolving all basic qualification issues against Western Cities Broadcasting, Inc.

2. The essential circumstances to which the petitioners direct our attention are: that the hearing designation order for this proceeding, which was released in October 1990, specified two hearing issues calling into question the character qualifications of Western and its principal shareholder; that the hearing record with respect to the comparative issues and one of the character issues against Western was closed in January 1992; that the parties filed proposed findings and reply findings as to those issues in June and July 1992; that an evidentiary hearing as to the other character issue against Western was postponed until March 1993 because of developments in another case involving a closely related issue; that the parties filed proposed findings and replies concerning that other character issue in May and June 1993; and that nothing of any material significance has happened in this case since June 1993.

3. The petitioners contend that further postponement of the ALJ's preparation and issuance of findings on the character issues could be prejudicial, as the value of demeanor evidence might be impaired as his recollection of it grows stale with the passage of time. They also contend that the ALJ's failure to date to issue an initial decision as to Western's basic qualifications to remain a licensee is: (1) contrary to the policy proclaimed in *Second Thursday Corp.*, 22 FCC 2d 515 (1970), *order on recon.*, 25 FCC 2d 112, 113 (1970), against conferring incidental benefits on principals of renewal applicants suspected of wrongdoing; (2) analogous to the practice of prolonging a licensee's immunity from competitive challenge that the court condemned in *New South Media Corp. v. FCC*, 685 F.2d 708 (D.C. Cir. 1982), as violative of the "full hearing" requirement of 47 U.S.C. §309(e); (3) in violation of the injunction in 47 U.S.C. §155(d) to "expedite the . . . business of the Commission with the objective of rendering a final decision within six months from the final date of the hearing in all hearing cases"; and (4) contrary to the provision in §0.341(d) of the FCC's rules, 47 C.F.R. §0.341(d), that presiding ALJs are to "make every effort" to issue initial decisions "within 90 days of the filing of the last responsive pleading."

4. The petitioners maintain, moreover, that the relief that they seek is not precluded by the freeze on comparative proceedings. They lay stress on a statement in the public notice announcing the freeze[1] to the effect that ALJs may prepare and issue supplemental decisions during the freeze to resolve basic qualifications issues specified in remand orders. Contending that there is no valid public policy reason for distinguishing in this regard between basic qualification issues added in remand orders and basic qualification issues that were specified in some other manner, the petitioners therefore conclude that the Commission intends to allow ALJs to decide any basic qualification issue during the freeze.

5. Whatever the merits of the petitioners' interpretation of the original *Freeze Notice*, their contentions in that regard have been overtaken by events, as we have emphasized in a more recent public notice that no issue concerning an applicant's basic qualifications is to be adjudicated in a comparative proceeding during the freeze unless disqualification of that applicant would obviate comparative evaluation in the case or the parties have filed a request for approval of a settlement agreement that is contingent upon resolution of a basic qualification issue. "Modification of FCC Comparative Proceedings Freeze Policy," 9 FCC Rcd 6689 (1994). As disqualification of Western would not obviate comparative evaluation in this case and as the parties have not filed for approval of a

[1] "Commission Freezes Comparative Proceedings," 9 FCC Rcd 1055 (1994).

settlement, the petitioners' request for relief cannot be granted consistently with the terms of the freeze on comparative hearings.

6. Nothing in *Second Thursday*, which concerned the motion of a trustee in bankruptcy for permission to sell the licensed station of an insolvent renewal applicant for the benefit of creditors, indicates that it would be improper for the ALJ in this case to postpone his resolution of the basic qualifications issues against Western in compliance with the freeze. Nor is *New South* clearly on point. The *New South* court did not rule on any question as to the propriety of staying proceedings in a comparative renewal case; rather, its holding concerned the propriety of adjudicating a basic qualification issue against a licensee in a noncomparative proceeding instituted shortly before the end of the license term instead of entertaining competing applications and litigating the issue in the context of a comparative proceeding.

7. The contention that §0.341(d) has been violated is frivolous, as the freeze has obviously superseded that rule provision insofar as it applies to this case. The petitioners' invocation of 47 U.S.C. §155(d) is also unavailing. They fail to explain why they suppose that a mandate to expedite proceedings with the objective of rendering final judgments within six months of the last hearing date obliges us to order the ALJ to issue a *partial* initial decision in this instance before we have resolved comparative policy issues that must be settled before a final disposition on the merits can be reached. We do not construe the injunction to expedite the "*orderly* conduct of the business of the Commission" (emphasis added) as requiring adjudicators to forgo orderly processes of deliberation in order to rush to judgment at an early date. We continue to believe that the best and most orderly way of deciding the fundamental comparative policy issues posed by *Bechtel* -- resolution of which is a prerequisite for final adjudication of the comparative issues in this case -- is through the rulemaking that has been instituted for that purpose, which we intend to complete with all appropriate speed. Hence, we believe that our chosen manner of proceeding in this and similar cases is within the bounds of our legitimate discretion.

8. ACCORDINGLY, IT IS ORDERED That the "Motion for Special Relief and Expedited Action" jointly filed by Longmont Broadcasting Co. and Amador S. Bustos on July 7, 1994 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications, Inc.
Petition for Waiver of Section 64.901(b)(4) of the Commissions Rules that Govern the Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities

AAD 94-22

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1995; Released: January 13, 1995

By the Chief, Accounting and Audits Division:

I. INTRODUCTION

1. On November 18, 1993, BellSouth Telecommunications, Inc. ("BellSouth"), a regulated telephone company, filed a petition for waiver ("petition") of Section 64.901(b)(4) of the Commission's rules.[1] In its petition, BellSouth requests permission to reallocate to its regulated activities the portion of three voice messaging systems now allocated to nonregulated activities. To accomplish this, it would transfer these three systems from the cost pool for common network plant to the cost pool for common official communications plant in Account 2212, Digital electronic switching.[2] MCI Telecommunications, Inc. ("MCI") filed an opposition, and BellSouth filed a reply.[3] As discussed below, we grant BellSouth permission to make the requested reallocation, effective January 1, 1994.

II. BACKGROUND

2. In the *Joint Cost Orders*,[4] the Commission specified that, absent a waiver, certain investment allocated to nonregulated use may not be reallocated to regulated use. This policy is intended to insure that investment risks of nonregulated ventures are not shifted to a carrier's regulated operations. The Commission stated, however, that it would permit such reallocation if a carrier submits a convincing case showing that (a) its regulated activities require the use of the plant capacity allocated to nonregulated activities, and (b) the carrier cannot obtain the needed capacity elsewhere at a lower cost. If a waiver is granted, the investment must be transferred at lower of the plant's depreciated cost or its fair market value.[5] The joint cost rules are contained in Section 64.901 of the Commission's rules.[6] Section 64.901(b)(4), of which BellSouth seeks a waiver, deals specifically with the allocation of central office equipment and outside plant investment costs. Under our rules, these costs are allocated between regulated and nonregulated activities based on the carrier's highest projected nonregulated use over the following three-year period. Absent a waiver, the carriers are not allowed to reduce the nonregulated allocation.

III. PLEADINGS

3. BellSouth uses voice messaging equipment for its own internal communications, which it refers to as official communications,[7] and for the internal communications of its affiliates and to provide voice messaging services to the public, a nonregulated activity.[8] BellSouth explains that when the same voice messaging equipment is used for its internal communications and either for internal communications of a nonregulated affiliate or to provide voice messaging to the public, it assigns the investment in the system to the cost pool for common network plant, which is allocated between regulated and nonregulated activities based upon a projected forecast use.

4. BellSouth proposes to transfer its investment in three voice messaging systems to the "support equipment" cost pool in Account 2212 where equipment used for official communications is classified. BellSouth allocates this cost pool between regulated activities and nonregulated activities based upon the investment value of Account 2212,

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[1] BellSouth Petition at 1.

[2] Cost pools are categories used to collect homogeneous costs to facilitate the allocation of costs between regulated and nonregulated services. A cost pool is referred to as a common cost pool when it contains costs that support both regulated and nonregulated activities.

[3] The record includes three letters in which the Accounting and Audits Division requested additional information from BellSouth, BellSouth's responses to those letters, and MCI's reply to the first BellSouth response. *See* Letter from Kenneth M. Ackerman, Chief, Accounting Systems Branch, Accounting and Audits Division, FCC to Robert Sutherland, BellSouth (August 9, 1994); Letter from Debra A. Weber, Systems Accountant, Accounting and Audits Division, FCC to Maurice P. Talbot, Jr., BellSouth, and Elizabeth Dickerson, MCI, (October 21, 1994); Letter from Debra A. Weber, FCC to Maurice P. Talbot, Jr., BellSouth (December 8, 1994); Letter from Sidney J. White, Jr., BellSouth to William F. Caton, Secretary, FCC (August 22, 1994); Letter from Maurice P. Talbot, Jr., BellSouth to Debra A. Weber, FCC (October 28, 1994); Letter from Sidney J. White, Jr., BellSouth to Debra A. Weber, FCC (December 14, 1994); Letter from Maurice P. Talbot, Jr., BellSouth to Debra A. Weber, FCC (December 28, 1994); Letter from Elizabeth Dickerson, MCI to William Caton, FCC (September 6, 1994).

[4] *Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987) (*Recon. Order*), *further recon.*, 3 FCC Rcd 6701 (1988) (*Further Recon. Order*), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[5] *Further Recon. Order*, 3 FCC Rcd at 6705, para. 29; *Recon. Order*, 2 FCC Rcd at 6291, para. 66; *Joint Cost Order*, 2 FCC Rcd at 1320, para. 169 & 1353, n.284.

[6] 47 C.F.R. §64.901.

[7] Equipment used to provide internal communications for a carrier's employees is referred to as "official communications equipment". *See, e.g., U S West Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs*, 3 FCC Rcd 2, 195, paras. 52-58, (Com. Car. Bur. 1988).

[8] BellSouth Petition at 2.

excluding amounts assigned to this cost pool.[9] This proposed transfer would increase the costs BellSouth allocates to regulated activities.

5. BellSouth states that these three systems were originally purchased during 1990 and 1991. BellSouth provides documentation showing that these three voice messaging systems are state-of-the-art, and are similar to the equipment the vendor currently offers for sale.[10]

6. BellSouth states that two of these voice messaging systems are located in Georgia and were originally purchased for regulated telephone company internal communications and for internal communications of BellSouth Services, Inc. ("BellSouth Services"), a nonregulated affiliate. BellSouth Services was created to provide regulated support services to the two BellSouth operating telephone companies that existed at that time. Effective January 1, 1992, BellSouth Services and the operating telephone companies were merged and renamed BellSouth Telecommunications, Inc. BellSouth states that the basic purpose of these voice messaging systems has not changed; they continue to be used for internal communications. Therefore, BellSouth proposes to transfer them to the cost pool for official communications plant.

7. BellSouth provides documentation showing that its official communications use of voice messaging in Georgia is increasing. It states that these two systems are operating at 80 percent capacity, the maximum number of ports are being utilized and there are no physical connections available to provide nonregulated services.[11] BellSouth also provides documentation showing the net book cost, the fair market value, and the cost to purchase new systems as of January 1, 1994.[12] This documentation shows that, as of that date, the two systems in Georgia had a net book cost of $725,248, fair market value of $851,000, and replacement cost for new systems of $938,714.

8. BellSouth states that the third voice messaging system that it proposes to transfer is located in North Carolina. BellSouth explains that it had three voice messaging systems in North Carolina that were used for both internal communications and to provide voice messaging service to the public. BellSouth refers to these systems as System #1, System #2, and System #3. BellSouth states that in 1993 it reconfigured these three voice messaging systems so that System #2 would be used entirely for internal communications in North and South Carolina, and Systems #1 and #3 would be used entirely to provide voice messaging service to the public. Because these systems are currently allocated based upon projected forecast use, BellSouth needs Commission approval to transfer System #2 to the cost pool for official communications plant.

9. BellSouth provides documentation showing that its use of voice messaging services for internal communications in North and South Carolina is increasing. It also shows that its provision of voice messaging services to the public in these states is expanding. BellSouth states that it needs the capacity of System #2 to support its internal communications for operations in North and South Carolina and that this system is operating at 80 percent capacity.[13] BellSouth provides documentation showing the net book cost, the fair market value, and the cost to purchase a new system as of January 1, 1994.[14] This documentation shows that, as of January 1, 1994, System #2 had a net book cost of $273,277, fair market value of $375,000, and replacement cost for a new system of $415,957.

10. In its opposition, MCI argues that BellSouth has not met the Commission's waiver requirements. MCI states that BellSouth did not provide proof from an outside vendor that it could not obtain the systems elsewhere at a lower cost, nor did it provide documentation that the systems are state-of-the-art.[15] On August 22, 1994, BellSouth submitted additional information in response to a Commission request. In a letter dated September 6, 1994, MCI states that this submission does not provide information necessary to compare BellSouth's systems with new systems.[16] In an October 28, 1994, meeting, which MCI attended,[17] BellSouth provided additional information that, in MCI's view, shows that BellSouth's proposal would not burden regulated ratepayers with obsolete equipment.

IV. DISCUSSION

11. Waiver of Commission rules is appropriate only if special circumstances warrant a deviation from the general rule[18] and such deviation will serve the public interest.[19] Generally, a waiver request must be consistent with the principles underlying the rule for which a waiver is requested. The Commission will grant a waiver to reallocate investment from nonregulated to regulated activities only if the carrier has made a showing that (a) there is a need for the equipment in regulated service and (b) the carrier cannot obtain this equipment at a lower cost elsewhere.[20] For the reasons set forth below, we find that BellSouth has shown that a waiver to reallocate a portion of three voice messaging systems from nonregulated activities to regulated activities is warranted.

12. We conclude that BellSouth should be granted a waiver to transfer the two voice messaging systems located in Georgia to the cost pool for official communications plant in Account 2212. These systems were originally placed in the cost pool for common network plant because they were used in part for internal communications of BellSouth Services, a nonregulated affiliate. After the merger between BellSouth Services and the operating telephone companies, the use of voice messaging on these two systems became official communications of the regulated telephone company. Moreover, although BellSouth Services was a nonregulated affiliate, it provided services almost exclusively to the BellSouth regulated telephone companies. For

[9] BellSouth October 28, 1994, Letter.
[10] BellSouth August 22, 1994, Letter; BellSouth October 28, 1994, Letter.
[11] BellSouth Petition at 3; BellSouth December 14, 1994, Letter.
[12] BellSouth August 22, 1994, Letter.
[13] BellSouth Petition at 4; BellSouth October 28, 1994, Letter; BellSouth December 14, 1994, Letter.
[14] BellSouth August 22, 1994, Letter.
[15] MCI Opposition at 1-2.
[16] MCI September 6, 1994, Letter at 2-4.
[17] This meeting was held at the Commission and was attended by representatives from BellSouth, MCI, and Commission staff.
[18] *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).
[19] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).
[20] *See supra*, note 6.

this reason, most of its costs were recovered from the operating telephone companies and were ultimately borne by their ratepayers. Therefore, the requested reallocation for these two voice messaging systems would have almost no impact on regulated costs. Accordingly, we find no reason to prevent BellSouth from transferring the investment in these two systems to the cost pool for official communications.

13. We also conclude that BellSouth should be granted a waiver to transfer System #2 in North Carolina to the cost pool for official communications. BellSouth reconfigured its voice messaging systems so that System #2 would be dedicated entirely to official communications. We believe it is appropriate to transfer this equipment because this transfer is consistent with the company's operations and does not contradict the purpose behind Section 64.901. The purpose of the rule was to prevent shifting the risk of nonregulated activities to regulated services, which could happen, for example, if costs incurred to start a nonregulated service that failed could be shifted to regulated operations. In this case, however, the public voice messaging service is still being offered and has shown substantial growth. Voice messaging for official communications has also grown significantly. Thus, the reconfiguration and resultant reallocation here has occurred as a result of growth of the services rather than the failure of a nonregulated activity.

14. BellSouth demonstrates that it meets the Commission's criteria for reallocating investment from nonregulated activities to regulated activities. It shows that the capacity of these systems is needed to support its official communications activities. In addition, BellSouth provides a statement from on outside vendor which shows that comparable capacity cannot be obtained elsewhere at a cost lower than the systems' net book value as of January 1, 1994.

15. Even though BellSouth dedicated these systems to official communications use prior to January 1, 1994, we believe that our waiver should reflect the circumstances as of that date. BellSouth waited until the end of 1993 to file its waiver request. The Commission's intent in the *Joint Cost Orders* was to allow carriers who meet the criteria for reallocation of nonregulated investment to do so on a timely basis. Therefore, we authorize BellSouth to transfer its investment in the three voice messaging systems from nonregulated activities to regulated activities as of January 1, 1994. We thus permit BellSouth to reassign its investment in these systems from its "common use information storage, forward retrieval" cost pool in Account 2212 to its "support equipment" cost pool in Account 2212.

V. ORDERING CLAUSE

16. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 201-205, 215, and 218-220 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 201-205, 215, and 218-220 that BellSouth's petition for waiver of Section 64.901(b)(4) of the Commission's rules to reallocate a portion of its investment in three voice messaging systems IS GRANTED as specified herein.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-143

In the Matter of

Amendment of Section 73.606(b),
Table of Allotments,
Television Broadcast Stations.
(Albion, Nebraska)

ERRATUM

Released: January 13, 1995

The *Notice of Proposed Rule Making* (DA 94-1374) concerning the above-captioned proceeding, released December 5, 1994, is corrected to specify reference coordinates for the proposed Channel 24 allotment at Albion, Nebraska, as 41-55-58 and 98-17-23, and specify a plus offset for the Channel 24 allotment.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

SWEETWATER INDEPENDENT SCHOOL DISTRICT
Roscoe, Texas — File No. BPLIF-920203DH

HERMLEIGH INDEPENDENT SCHOOL DISTRICT
Snyder, Texas — File No. BPLIF-920821DA

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels D1-D4

MEMORANDUM OPINION AND ORDER

Adopted: November 28, 1994; Released: January 13, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Sweetwater Independent School District (Sweetwater) and Hermleigh Independent School District (Hermleigh), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the areas of Roscoe and Snyder, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Both Sweetwater and Hermleigh are school districts that are accredited by the Texas Education Agency and that are applying to provide ITFS service to students enrolled at schools within their jurisdictions.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with thehighest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Both Sweetwater and Hermleigh are entitled to four points because they are school districts that propose to serve the formal educational needs of students at schools located within their jurisdictions.

Accreditation. Both applicants are entitled to three points because they are accredited by the Texas Education Agency.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Sweetwater's illustrative schedule and program grid propose an average of 24.375 hours of formal educational programming per channel per week. Thus, Sweetwater is entitled to one programming merit point. In contrast,

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Hermleigh's illustrative schedule and program grid propose an average of 41 hours of formal educationaleRTFS programming per channel per week. Thus, Hermleigh is entitled to two programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Sweetwater is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational ITFS programming per channel per week, for a total of ten points. Hermleigh is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation and two points for proposing at least 41 hours of formal educational ITFS programming per channel per week, for a total of eleven points. Thus, the tentative selectee is Hermleigh.

OTHER MATTERS

5. Hermleigh proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Snyder Microwave Communications, L.C., two of whose provisions do not comply with Commission's requirements for such leases. First, the lease appears to give Snyder unilateral authority to change the transmission site. We view this as inconsistent with the responsibility of the ITFS licensee to ensure the adequacy of its service. *Second Report and Order*, 101 FCC 2d at 90. Further, the lease does not include a provision which would afford the licensee an opportunity to purchase or lease the ITFS equipment in the event that the lease is terminated as a result of some action on the part of the excess capacity lessee. We believe that, as a matter of policy, such a provision should be added to insure that a licensee will not be forced to interrupt its ITFS programming as a result of any action on the part of its lessee. See *Turner Independent School District*, 8 FCC Rcd 3153, 3155 (1993). Although inconsistent with our requirements for excess capacity leases, these provisions neither reflect on the applicant's basic or comparative qualifications, nor preclude grant of an authorization. Nonetheless, Hermleigh's authorization will be conditioned upon conformity of the lease to Commission requirements. See *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 FCC Rcd 1472, 1473 (1987).

6. No petitions to deny or informal objections have been filed against Hermleigh's application, and we find Hermleigh fully qualified to be an ITFS licensee. We also conclude that grant of Hermleigh's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Sweetwater Independent School District (BPLIF-920203DH) IS DENIED, and the application of Hermleigh Independent School District (BPLIF-920821DA) IS GRANTED, subject to the condition that within 30 days of the release of this Order, Hermleigh submit to the Chief, Distribution Services Branch for approval, information demonstrating compliance with Commission requirements, including, if appropriate, an amended lease agreement conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision Industries LOI-94-9
Smithfield, North Carolina

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a letter received by the Commission, dated December 8, 1993, the Town of Smithfield, North Carolina, alleged violations by Cablevision Industries of Smithfield, North Carolina ("CVI"), of Commission regulations governing the provision of cable television service. In response to this complaint, the Commission issued Letter of Inquiry 94-9 ("LOI") to CVI on February, 22 1994.[1] The LOI asked CVI to provide information concerning, among other issues, rate and service changes in anticipation of, and/or in response to, rate regulation, including the offering of packages which allegedly are not rate-regulated.[2] CVI responded to our LOI on March 24, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the pur-

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[1] Letter from Alexandra M. Wilson, Acting Chief, Cable Services Bureau, FCC, to Cablevision Industries, LOI-94-9 (February 22, 1994). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference "Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving CVI. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order CVI to make refunds to subscribers in regard to CVI's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] The LOI also requested information concerning CVI's compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of CVI's package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623 (a)(2), 47 8U.S.C. § 543 (a)(2) (1992).

[4] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[9] Communications Act of 1934 § 623 (c)(1)(A), 47 U.S.C. § 543 (c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

poses of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order*, the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, CVI's services included a 12 channel basic tier, called Basic Reception Service, for $11.55 per month, and a 21 channel cable programming service tier, called Cable Programming Tier 1, for $11.40 per month.

7. The following chart summarizes CVI's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic Reception Service	12	$11.55
2. Cable Programming Tier 1	21	$11.40
Total	33	$22.95

8. Beginning September 1, 1993, the date our rate regulations became effective, CVI restructured its service offerings. CVI's restructured service offerings included a 14 channel basic tier, called Basic Reception Service, for $9.15 per month, an 18 channel cable programming service tier, called Cable Programming Tier 1, for $12.30 per month, and three channels offered on an individual basis as well as in a separate package. The three channels were The Discovery Channel, HTS, and Cable News Network ("CNN"). All three channels were originally in CVI's Cable Programming Service Tier 1.

9. CVI states that The Discovery Channel, HTS, and CNN could be purchased individually for $1.50 per month. All three channels could be purchased as a package, called Expanded Program Package, for $3.00 per month.

10. The following chart summarizes CVI's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Basic Reception Service	14	$ 9.15
2. Cable Programming Tier 1	18	$12.30
3. Expanded Programming Package	3	$ 3.00
Total	35	$24.45

11. CVI argues, *inter alia*, that it began offering its services individually and through the Expanded Programming Package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of the date of its response, CVI states that 22 subscriptions to individual channels were made, while 1,725 out of CVI's 1,896 subscribers took the Expanded Programming Package.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[15] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[16] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[17] First, we examine whether CVI's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. CVI's restructuring effective September 1, 1993, involved its movement of three channels (The Discovery Channel, HTS, and CNN) from its 21 channel Cable Programming Tier 1 to create the three channel package that it alleges is not rate-regulated. Thus, CVI removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, CVI avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if CVI had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, it appears that customers who were receiving the three cable programming service tier channels at issue continued to receive them after the restructuring, and there appears to be no sufficient justification for CVI's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that CVI's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, CVI apparently automatically subscribed its customers to the offerings that previously had been part of its cable programming service tier. In light of these facts, it appears that CVI's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if CVI's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then CVI would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[18]

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[11] H.R. Rep. No. 628 at 79.

[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[13] *Rate Order* ¶ 451.

[14] This Order does not evaluate CVI's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[15] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

[16] *Rate Order* ¶ 451.

[17] *Id.* at ¶ 453.

[18] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte chan-

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[19] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[20] This is not the type of offering that CVI and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[21]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the three services, because subscribers may purchase the three channels for $1.50 each or the three-channel package for $3.00. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of CVI ssubmission reveals that there were only 22 subscriptions to individual a la carte channels, while 1,725 out of CVI's 1,896 subscribers took the Expanded Programming Package. Our test does not specify what number would indicate that an offering is "a realistic service offering." However, the fact that such a low number of subscribers opted for individual channels rather than the package, together with the other factors present in this case,[22] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[23] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that CVI's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (three) was small.[24] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to CVI that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[25] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that CVI's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject CVI to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[26] in which we determined that we will

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nels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) (*"Going Forward Order"*). Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶46. However, in order to determine whether CVI evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[19] *Rate Order* ¶ 329.

[20] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[21] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[22] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[23] *Second Reconsideration Order* at ¶ 196.

[24] *Id.*

[25] *See Going Forward Order* at ¶ 40.

[26] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation, while here, CVI attempted to treat only three channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[27] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[28]

21. We will not require CVI to restructure its tiers so as to return the channels offered in the a la carte package to the cable programming service tier.[29] Instead, on a prospective basis, we will consider CVI's collective offering of a la carte channels a new product tier[30] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because CVI's three-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject CVI or its Smithfield customers to the confusion and transaction costs that would result if we required CVI to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that CVI's package as it existed on February 22, 1994, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[27] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").
[28] *Second Reconsideration Order* ¶ 196.
[29] We are not precluding CVI from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.
[30] *See Going Forward Order* at ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

STAR CABLE ASSOCIATES
Petition for Reconsideration

of the Certification of
Palmyra Township, Ohio
to Regulate Basic Cable Rates
(OH2069)

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On March 25, 1994, Star Cable Associates ("Star Cable") filed a timely petition for reconsideration challenging the certification of Palmyra Township, Ohio ("Palmyra Township") to regulate rates for basic cable service and associated equipment.[1] Palmyra Township did not file an opposition to Star Cable's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

II. DISCUSSION

3. Star Cable argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Palmyra Township, its franchise area.[7] Star Cable claims that it currently serves no more than 10 of the 797 households (that is, occupied housing units)[8] in its franchise area, or 1.25 percent of the total number of households. As supporting documentation, Star Cable provides 1990 Census data[9] which shows that there are 797 households in Palmyra Township. Star Cable also submits a computer print-out with sufficient subscriber information to support its claim that it serves no more than 10 households in the franchise area.[10] Finally, Star Cable provides an affidavit by a responsible official certifying the accuracy of the data included in the petition.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within the franchise area.[12] Star Cable has met this burden. Star Cable appropriately relied on data reflecting the number of households as required by our rules.[13] Relying on this data, Star Cable has submitted sufficient evidence demonstrating that its cable system serving Palmyra Township, its franchise area, serves no more than 10 of the 797 households, or 1.25 percent of the households, within its franchise area. Thus, we find Star Cable's system serving Palmyra Township is subject to effective competition. Accordingly, its petition is granted.

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[1] Palmyra Township filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on February 22, 1994, which became effective on March 24, 1994.

[2] 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or 4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. 47 C.F.R. § 76.905(a) and (b)(1).

[8] As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[9] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[10] The computer printout provided by Star Cable indicates that there are only 8 subscribers located in Palmyra Township. This number reflects an even lower penetration (1.0 percent) than that claimed in Star Cable's petition.

[11] 47 C.F.R. § 76.906.

[12] 47 C.F.R. § 76.911(b)(1).

[13] *Third Recon. Order, supra.*

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Star Cable Associates challenging the certification of Palmyra Township, Ohio to regulate basic cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Palmyra Township, Ohio to regulate Star Cable Associates' basic cable rates IS RESCINDED.

7. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

STAR CABLE ASSOCIATES

Petition for Reconsideration

of the Certification of
Farmington Township, Ohio
to Regulate Basic Cable Rates
(OH1962)

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On December 3, 1993, Star Cable Associates ("Star Cable") filed a timely petition for reconsideration challenging the certification of Farmington Township, Ohio ("Farmington Township") to regulate rates for basic cable service and associated equipment.[1] Farmington Township did not file an opposition to Star Cable's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[3] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[5] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[6]

II. DISCUSSION

3. Star Cable argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Farmington Township, its franchise area.[7] Star Cable claims that it currently serves only 102 of the 423 households (that is, occupied housing units)[8] in its franchisearea, or 24.1 percent of the total number of households. As supporting documentation, Star Cable provides 1990 Census data[9] which shows that there are 423 households in Farmington Township.[10] Star Cable also submits a computer print-out with sufficient subscriber information to support its claim that it serves 102 households in the franchise area.[11] Finally, Star Cable provides an affidavit by a responsible official certifying the accuracy of the data included in the petition.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[12] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present with-

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[1] Farmington Township filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on November 19, 1993. This attempt at certification was returned, and Farmington Township filed a second FCC Form 328 on December 3, 1993, which became effective on January 2, 1994.

[2] 47 U.S.C. § 543(a)(4).

[3] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or 4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. 47 C.F.R. § 76.905(a) and (b)(1).

[8] As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[9] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994).

[10] Households in West Farmington Village, an incorporated area within Farmington Township were excluded from this total. The franchising authority is only permitted to contract with a cable company "with respect to the establishment or operation of a cable television system in the unincorporated area of the township[]." Ohio Rev. Code Ann. § 505.91 (Anderson 1992).

[11] The computer printout provided by Star Cable indicates that Farmington has a total of 85 subscribers. Star Cable added 17 subscribers to this total to account for subscribers listed separately in their records under Blackbrook TL. Blackbrook is a trailer park located within the Farmington franchise area.

[12] 47 C.F.R. § 76.906.

in the franchise area.[13] Star Cable has met this burden. Star Cable appropriately relied on data reflecting the number of households as required by our rules.[14] Relying on this data, Star Cable has submitted sufficient evidence demonstrating that its cable system serving Farmington Township, its franchise area, serves 102 of the 423 households, or 24.1 percent of the households, within its franchise area. Thus, we find Star Cable's system serving Farmington Township is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Star Cable Associates challenging the certification of Farmington Township, Ohio to regulate basic cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Farmington Township, Ohio to regulate Star Cable Associates' basic cable rates IS RESCINDED.

7. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] 47 C.F.R. § 76.911(b)(1).
[14] *Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI CABLEVISION OF GEORGIA, INC.

Petition for Revocation of Certification

of the Certification of the Consolidated Government of Columbus, Georgia to regulate basic cable rates (GA0012)

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On January 27, 1994, TCI Cablevision of Georgia, Inc. ("TCI") filed a Petition for Revocation of Certification challenging the certification of the Consolidated Government of Columbus, Georgia ("Columbus") to regulate rates for basic cable service and associated equipment.[1] Columbus filed an "additional pleading" to which TCI filed a reply. In addition, TCI filed a supplemental pleading pursuant to the Commission's *Effective Competition Order*.[2]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7] After the 30-day deadline for filing petitions for reconsideration has elapsed, cable operators may challenge the franchising authority's certification by filing a petition for revocation.[8] However, regardless of its grounds, a petition for revocation does not automatically trigger a stay of the franchising authority's power to regulate basic rates.[9]

II. DISCUSSION

3. TCI argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Columbus, its franchise area.[10] TCI claims that it serves 13,556 total subscribers in relation to the 65,858 households (that is, occupied housing units)[11] in Columbus, or 20.6 percent of the total number of households.[12] As supporting documentation, TCI provides 1990 Census data[13] which shows that there are 65,858 households in Columbus. TCI also submits a computer print-out with sufficient subscriber information to support its claim that it serves 13,556 subscribers[14] in the franchise area.

4. In its "additional pleading," Columbus alleges that TCI is not subject to effective competition because of TCI's

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[1] Columbus filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on September 1, 1993, which became effective !on October 1, 1993.

[2] *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] 47 U.S.C. §543(a)(4).

[4] 47 C.F.R. §§76.906, 76.910(b)(4).

[5] 47 C.F.R. §76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or personnel to administer, rate regulations; 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or 4) the cable system in question is subject to effective competition. 47 C.F.R. §76.910(b). *See also* 47 U.S.C. §543(a)(4).

[6] 47 C.F.R. §§1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. §76.911(c).

[8] 47 C.F.R. §76.914.

[9] 47 C.F.R. §76.914(d).

[10] The Commission's Rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's Rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the system's service. 47 C.F.R. §76.905(a) and (b)(1).

[11] As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[12] In its supplemental pleading filed pursuant to the Commission's *Effective Competition Order*, TCI perpetuates the assertion first raised in its Petition for Revocation that the correct number of households in Columbus for purposes of determining effective competition is the total number of housing units, which is defined by the Census Bureau to include both occupied and vacant housing units. Therefore, TCI incorrectly asserts that there are 70,902 households in Columbus. However, the Census information filed by TCI demonstrates that there are 65,858 households in Columbus. For purposes of our effective competition analysis, the Commission has used the correct figure of 65,858 households.

[13] As the Commission has previously stated, 1990 Census data is an appropriate source for household data. *Effective Competition Order*, 9 FCC Rcd 3656 (1994).

[14] TCI chose to include the number of commercial subscribers in its subscriber count. However, commercial entities were appropriately excluded from (the household count.

affirmative decision to limit its service area.[15] Columbus submitted no evidence to support this allegation. In its reply, TCI reiterates its assertion that the entire City of Columbus is its franchise area and that, as business opportunities have been identified and capital funds secured, TCI has expanded its service area in Columbus.[16] TCI also argued that, if the Commission accepts Columbus' argument that TCI redefined its franchise area, TCI is still subject to effective competition in its "redefined franchise area" under the Commission's direct competition test.[17] Because we conclude that TCI has not redefined its franchise area and is subject to effective competition under the Commission's low penetration test, we need not address TCI's direct competition argument.

5. We are unpersuaded that the appropriate franchise area for purposes of effective competition is something less than the entire City of Columbus. Columbus' "additional pleading" provides insufficient evidence to support its claim that TCI has made an affirmative decision to limit its service to a specified portion of the City. Without providing adequate support for its claims, Columbus merely concludes that TCI has decided not to serve the entire franchise area because TCI has not expanded to fill its entire franchise area. However, "[t]he fact that a franchise area has not as yet been filled out by construction of a system would not by itself be taken as redefining the service area."[18] Therefore, we conclude that Columbus has failed to sustain its burden of proof that TCI has redefined its franchise area.

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[19] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within the franchise area.[20] TCI has met this burden.

7. TCI has submitted sufficient evidence which includes "household" data.[21] Relying on this data, TCI has submitted sufficient evidence demonstrating that its cable system serving Columbus, its franchise area, serves 13,556 of the 65,858 households, or 20.6 percent of the households within its franchise area. Thus, we find TCI's system serving the Consolidated Government of Columbus is subject to effective competition. Accordingly, its Petition for Revocation is granted.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the Petition for Revocation filed by TCI Cablevision of Georgia, Inc. challenging the Certification of the Consolidated Government of Columbus, Georgia IS GRANTED.

9. IT IS FURTHER ORDERED that the certification of the Consolidated Government of Columbus, Georgia to regulate TCI's basic cable rates IS REVOKED.

10. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's Rules.[22]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[15] In its *First Order on Reconsideration*, the Commission clarified the definition of "franchise area" for purposes of determining effective competition. *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993) (*"First Recon. Order"*). Generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise." *Id.* at 1180. The Commission stated, however, that a more restricted definition of "franchise area" may be appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's 'franchise area.'" *Id.* at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision . . . to restrict service." *Id.*

[16] *See* Declaration of Michael Jeffrey, General Manager TCI Cablevision of Georgia, Inc.

[17] The Commission's Rules provide that a cable system is subject to effective competition if the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area. 47 C.F.R. §§76.905(b)(2).

[18] *First Recon. Order, supra.*

[19] 47 C.F.R. §76.906.

[20] 47 C.F.R. §76.911(b)(1).

[21] *See* n.12, *supra.*

[22] 47 C.F.R. §0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS OF
MICHIGAN, INC.

Petition for Reconsideration

of Certification of
Venice Township, MI
to Regulate Basic Cable Service Rates
(MI0649)

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 1, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration, challenging the certification of Venice Township, Michigan ("the Township") to regulate C-TEC's rates for basic cable service and associated equipment.[1] C-TEC filed additional documentation in support of its original petition pursuant to a recent Commission Order.[2] In addition, C-TEC submitted a response dated November 30, 1994 to a Bureau letter[3] requesting clarification of previously filed information. The Township did not file an opposition to C-TEC's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate the basic cable service rates of cable operators that are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on the presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[5] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[8]

II. DISCUSSION

3. C-TEC asserts that its cable system is subject to effective competition because it serves fewer than 30 percent of thehouseholds in Venice Township, its franchise area.[9] Specifically, C-TEC claims that it serves 170 of the 812 households in Venice Township or approximately 21 percent of the total number of households. As supporting documentation, C-TEC provides 1990 Census data,[10] which demonstrates that there are 812 occupied housing units[11] in Venice Township. In addition, C-TEC submits a computer-generated print-out with sufficient subscriber information to support its claim that it serves 170 subscribers in the franchise area. Finally, C-TEC submits a declaration under penalty of perjury from a responsible official certifying the accuracy of the data in the petition.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[12] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by § 76.905 of the Commission's rules, is present within the franchise area.[13] C-TEC has met this burden. C-TEC has

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[1] Venice submitted its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on October 4, 1993. Its certification became effective on November 3, 1993.

[2] *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994). (*"Effective Competition Order"*).

[3] Letter to Jacqueline Cleary, Counsel to C-TEC Cable Systems of Michigan (November 25, 1994).

[4] 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulation; (3) procedural laws and regulations, applicable to rate regulation proceedings by the franchising authority, do not provide a reasonable opportunity for the consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. § 76.911(c)(1).

[9] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the franchise area subscribe to the service of the cable system. 47 C.F.R. §§ 76.905(a) and (b)(1).

[10] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra.*

[11] As the Commission stated recently, "we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics, 1990 CPH-1-24, Appendix B at B-8.

[12] 47 C.F.R. § 76.906.

[13] 47 C.F.R. § 76.911(b)(1).

appropriately relied on data reflecting the number of households as required by our rules.[14] Relying on this data, C-TEC has submitted sufficient evidence demonstrating that its cable system serves fewer than 30 percent of the households in its franchise area.[15] Thus, we find that C-TEC's system serving Venice Township is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration, filed by C-TEC Cable Systems of Michigan, Inc., challenging the certification of Venice Township to regulate basic cable rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of Venice Township, Michigan, to regulate the basic cable service rates of C-TEC Cable Systems of Michigan, Inc., RESCINDED.

7. This action is taken pursuant to delegated authority under § 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[14] *Third Recon. Order, supra.*

[15] Initially, in its petition for reconsideration, C-TEC stated that it served 176 of 1001 homes in its franchise area. This "homes" data was apparently based on the number of housing units (occupied and vacant) in Venice Township. In its supplement, however, C-TEC submitted data demonstrating that there are 812 occupied housing units in the franchise area. C-TEC also indicated that it currently serves 170, not 176, subscribers. In its November 30, 1994 response, C-TEC explained that "[a]ny differences in subscriber information supplied in C-TEC's original filings and C-TEC's supplemental filings are attributable to changes in the number of subscribers in the time between the original submission and the supplement. C-TEC updated subscriber information in its supplements so that the 'effective competition' analysis was based on the most recent information available." We will accept C-TEC's updated subscriber numbers as accurate. As C-TEC's supplement contains the appropriate housing and subscriber data, we have relied upon it for purposes of our analysis.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLESOUTH, INC.

Petition for Reconsideration
of Certification of
City of Northport, AL (AL0041)
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On April 7, 1994, CableSouth, Inc. ("CableSouth") filed a timely petition for reconsideration challenging the certification of the City of Northport, AL ("Northport") to regulate rates for the basic cable service and associated equipment.[1] In addition, CableSouth submitted a supplement to its petition containing supporting documentation pursuant to a recent Commission order.[2] Northport did not file an opposition to CableSouth's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[4] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[6] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[7]

II. DISCUSSION

3. CableSouth states that its cable system is subject to effective competition because the system serves fewer than 30 percent of the households in Northport, its franchise area.[8] CableSouth states that it serves 485 of the 6,519 "homes" in Northport, or 7.4 percent of the total number of homes. As support, CableSouth submits a copy from the "1990 Census of Population andhHousing - Summary Tape File 3"[9] which reflects that there are 6,519 occupied housing units[10] within the City of Northport. In addition, CableSouth submits a copy of its "Management Summary Report" which indicates that as of January 24, 1994, its system served 485 subscribers. CableSouth also includes a declaration from its Director of Administrative Services who explains that the number of subscribers is based on each single family unit account, regardless of additional outlets or the amount of cable television product purchased. In addition, CableSouth indicates, the 485 subscribers includes those receiving free cable service.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, exists in the franchise area.[12] CableSouth has met its burden. CableSouth appropriately relied on data reflecting the number of households as required by our rules.[13] Relying on this data, CableSouth has submitted evidence demonstrating that its cable system serving Northport, its franchise area, serves 485 of the 6,519 households, or 7.4 per-

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[1] Northport filed its "Certification of Franchising Authority to Regulate Basic Service Rates and Initial Finding of Lack of Effective Competition" (FCC Form 328) on February, 14, 1994. Its certification became effective on March 16, 1994.

[2] *Cable Operators' Petition for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Commission's Rules provide that only the rates of cable systems which are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system. 47 C.F.R. §76.905(a) and(b)(1).

[9] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra.*

[10] As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." Third Order on Reconsideration, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon Order"*). The count of "households" in the 1990 Census reflects only occupied housing units. See Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B, at B-8.

[11] 47 C.F.R. § 76.906

[12] 47 C.F.R. § 76.911(b)

[13] *Third Recon. Order, supra.*

cent of the households in its franchise area. Thus, we find that CableSouth's system serving Northport is subject to effective competition. Accordingly, CableSouth's petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by CableSouth, Inc. challenging the certification of the City of Northport, AL to regulate CableSouth's rates IS GRANTED.

6. IT IS FURTHER ORDERED that the certification of the City of Northport to regulate CableSouth, Inc.'s basic cable service rates IS RESCINDED.

7. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MERCOM, INC. AND ITS SUBSIDIARY,
COMMUNICATIONS AND
CABLEVISION, INC.,
D/B/A RIVER RAISIN CABLEVISION

Petition for Reconsideration

of the Certification of
City of Monroe, MI
to Regulate Basic Cable Service Rates
(MI0765)

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 12, 1993, Mercom, Inc. and its subsidiary, Communications and Cablevision, Inc., d/b/a River Raisin Cablevision, ("Mercom") filed a timely petition for reconsideration challenging the certification of the City of Monroe ("the City") to regulate rates for basic cable service and associated equipment.[1] The City filed a supplement[2] to an opposition to the petition for reconsideration on August 19, 1994, but had never filed an original opposition.[3] While their supplement is untimely, the assertions made by the City would not change the outcome of this order.[4]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[5] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[6] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[7] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[8] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[9]

II. DISCUSSION

3. Mercom argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in the City of Monroe, its franchise area.[10] Specifically, Mercom states that it serves 77 of the 8,840 "homes" within the City or less than 1 percent of the total number of "homes" within the franchise area. In support of this claim, Mercom refers to a specific section of the 1990 Census[11] that indicates that there are 8,840 "housing units" in the City of Monroe. Finally, Mercom submits a declaration under penalty of perjury from a responsible official certifying the accuracy of the data in the petition.

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[12] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within

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[1] Monroe filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition ("FCC Form 328") on October 4, 1993. The certification became effective on November 3, 1993.

[2] In its "Supplement to Oppositions," the City provides documentation to support a claim that the cable operator redefined its franchise area and therefore is not subject to effective competition. However, an opposition to Mercom's petition for reconsideration was never filed with the Commission.

[3] On November 24, 1993, the City filed a "Motion to Extend Deadline for Response to Petition for Reconsideration of Certification" requesting that the Commission grant it more time to file an opposition to Mercom's petition for reconsideration, but it did not subsequently file an actual opposition.O

[4] *See In the Matter of Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service. Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*) ("A franchising authority which has not filed a timely opposition to a petition for reconsideration or revocation in accordance with our rules may not take this opportunity to do so.").

[5] 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[7] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt or administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[8] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[9] 47 C.F.R. § 76.911(c).

[10] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 per cent of the households in the system's franchise area subscribe to the system's service. 47 C.F.R. § 76.905(a) and (b)(1).

[11] *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 CH-1-24, 1990 Census of Housing, General Housing Characteristics, Michigan, Table 1.

[12] 47 C.F.R. § 76.906.

the franchise area.[13] Mercom has failed to meet this burden. Specifically, Mercom inappropriately relied upon "housing unit" data rather than "household" data to support its effective competition claim. Mercom's claim is based on the number of housing units (that is, occupied and vacant units) within the franchise area. Our rules, however, require the use of data reflecting the number of "households" (*i.e.*, occupied housing units) in the franchise area. *See Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order"*).[14] As Mercom has failed to base its effective competition claim on "household" data as required by our rules, we will deny its petition.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Mercom, Inc. and its subsidiary, Communications and Cablevision, Inc. d/b/a River Raisin Cablevision challenging the certification of the City of Monroe, MI to regulate basic cable rates IS DENIED.

6. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

7. IT IS FURTHER ORDERED that Mercom, Inc. and its subsidiary, Communications and Cablevision, Inc. d/b/a River Raisin Cablevision SHALL FILE the required rate justifications on the applicable forms with the City of Monroe, MI, within thirty (30) days of the release date of this *Memorandum Opinion and Order* or within thirty (30) days of receipt of notice from the City of Monroe that it is regulating Mercom's rates, whichever is later.

8. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[13] 47 C.F.R. § 76.911(b)(1).

[14] As the Commission stated in the *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend households' to have a different meaning than in the 1990 Census that would include vacant units or even partial year vacant units." *Third Recon. Order, supra*. The term "household" is defined for purposes of the 1990 Census data as "all the persons who occupy a housing unit." Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. Thus, the term "households" reflects only occupied housing units. The term "housing units", however, was defined by the Census Bureau to include both occupied and vacant units.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS
OF NEW YORK, INC.

Petition for Reconsideration

of the Certification of
New York State Commission on Cable
Television, to Regulate
Basic Cable Service
Rates (NY1642)

By the Chief, Cable Services Bureau:

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

I. INTRODUCTION

1. On June 21, 1994, C-TEC Cable System of New York, Inc., ("C-TEC") submitted a timely-filed petition for reconsideration challenging the certification of the New York State Commission on Cable Television ("New York")[1] to regulate the system's rates for basic cable service and associated equipment.[2] New York did not file an opposition.

2. Section 623(a)(4) of the Communications Act, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchising authority has actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the effective date of such certification.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

3. C-TEC argues that its cable system is subject to effective competition because it serves fewer than 30 percent of the households in Somers Town, its franchise area.[8] C-TEC claims that it serves only 1,712 of the 5,727 households in its franchise area, or 29 percent of the total number of households. As support C-TEC submits a declaration under penalty of perjury which refers to a specific cite[9] in the 1990 Census which indicates that there are 5,727 households (that is, occupied housing units)[10] in Somers Town. C-TEC's declaration states that it serves 1,712 subscribers in a town with 5,727 "Households".

4. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[11] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's Rules, is present within its franchise area.[12] Based on the evidence, we find that C-TEC has met this burden. C-TEC appropriately relied on data reflecting the number of households as required by our rules.[13] Relying on this data, C-TEC has submitted sufficient evidence that its system serves fewer than 30

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[1] It is noted that C-TEC's petition is styled as a challenge to the certification of Somers, New York. However, our records indicate that it is the New York State Commission on Cable Television, and not the Town of Somers, which has sought certification to regulate C-TEC's rates in Somers, New York.

[2] New York filed its Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Effective Competition ("FCC Form 328") on April 25, 1994. Its certification became effective on May 25, 1994.

[3] 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[5] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[6] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[7] 47 C.F.R. § 76.911(c).

[8] The Commission's rules provide that only the rates of cable systems that are subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the system's franchise area subscribe to the cable service of a cable system. 47 C.F.R. § 76.905(a) and (b)(1).

[9] In her declaration, Ms. DeWees cites to 1990 Census of Housing Bureau of the Census, U.S. Dept. of Commerce, 1990 CH-1-34, 1990 Census of Housing, General Housing Characteristics, New York, Table 1, at 18.

[10] As the Commission noted recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994). The term "household" is defined by Census Bureau to include only occupied housing units. *See* Bureau of the Census, Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[11] 47 C.F.R. § 76.906.

[12] 47 C.F.R. § 76.911(b)(1).

[13] *See Third Recon. Order, supra.*

percent of the households in the franchise area. Thus, we find that C-TEC's system serving Somers Town is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for reconsideration filed C-TEC Cable Systems of New York, Inc., challenging the certification of New York State Commission on Cable Television, to regulate its basic cable service IS GRANTED.

6. IT IS FURTHER ORDERED that the certification granted to New York State Commission on Cable Television, to regulate C-TEC Cable Systems of New York, Inc., basic cable rates in Somers Town, New York, IS RESCINDED.

7. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS OF
MICHIGAN, INC.

Petition for Reconsideration

of Certification of
Ashland Township, MI
to Regulate Basic Cable Service Rates
(MI1169)

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 13, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On November 1, 1993, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed a timely petition for reconsideration, challenging the certification of Ashland Township, Michigan ("the Township") to regulate C-TEC's rates for basic cable service and associated equipment.[1] On November 26, 1993, the Township of Ashland filed an opposition to C-TEC's petition for reconsideration to which C-TEC then filed a reply on December 7, 1993. Pursuant to a recent Commission Order,[2] C-TEC filed additional documentation in support of its original petition. Finally, C-TEC submitted a response dated November 30, 1994 to a Bureau request dated November 25, 1994, asking for clarification on previously-filed information.[3]

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate the basic cable service rates of cable operators that are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on the presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[5] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[7] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[8]

II. DISCUSSION

3. C-TEC asserts that its system is subject to effective competition because it serves fewer than 30 percent of the households in Ashland Township, its franchise area.[9] Specifically, C-TEC claims that it serves 43 of the 669 households within Ashland Township or 6.4 percent of the total number of households. As supporting documentation, C-TEC provides 1990 Census data,[10] which demonstrates that there are 669 occupied housing units[11] in Ashland Township. In addition, C-TEC submits a computer-generated print-out with sufficient subscriber information to support its claim that it serves 43 subscribers in the franchise area. Finally, C-TEC submits a declaration under penalty of perjury from a responsible official certifying the accuracy of the data in the petition.

4. In its opposition, the Township argues that C-TEC has made its service available to only 108 homes in the franchise area. Thus, the Township argues that C-TEC's actual penetration level is 37.9629 percent when C-TEC's total number of subscribers is compared to the number of homes where service is actually available. Based on this, the Township argues that C-TEC is not subject to effective competition in the franchise area, as defined under our rules. In reply, C-TEC contends that the Township's ar-

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[1] Ashland filed its "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition" ("FCC Form 328") on September 27, 1993. Its certification became effective on October 27, 1993.

[2] *See Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (" *Effective Competition Order").*

[3] Letter to Jacqueline Cleary, Counsel to C-TEC Cable Systems of Michigan (November 25, 1994).

[4] 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulation; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for the consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition.47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. § 76.911(c)(1).

[9] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the franchise area subscribe to the cable service of the cable system. 47 C.F.R. §§ 76.905(a) and (b)(1).

[10] As the Commission has stated recently, the 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra.*

[11] As the Commission stated recently, "we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census that would include vacant units." *Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) (*"Third Recon. Order").* The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, 1990 Census of Population and Housing, Summary Population and Housing Characteristics, 1990 CPH-1-24, Appendix B at B-8.

gument improperly relies on a "homes passed" test in support of its claim that C-TEC is not subject to effective competition. Noting that the Commission has previously rejected the "homes passed" test, C-TEC argues that the proper test for establishing effective competition is based on a count of all households in the authorized franchise area (*i.e.*, all of Ashland Township).

5. As a preliminary matter, we are unpersuaded that the relevant franchise area for purposes of determining the presence of effective competition in this case is some area other than thep entire Ashland Township. The Township's argument is based on the number of subscribers served by C-TEC in relation to the number of "homes" that C-TEC's cable system passes. The Commission, however, specifically rejected this test as a measuring of determining the presence of effective competition.[12] As the Commission stated previously, generally, "[a] franchise area is the area a system operator is granted authority to serve in its franchise."[13] As such, the correct measure for determining whether a cable system serves fewer than 30 percent of the households in the franchise area is by comparing the number of subscribers served by C-TEC's cable system in relation to the total number of households in the franchise area.

6. To the extent that the Township suggests that C-TEC has intentionally redefined its franchise area to encompass only the 108 homes it currently passes, we find no evidence to support such an assertion.[14] The Township provides no evidence that C-TEC has redefined its franchise area. The Township simply asserts that C-TEC passes only 108 "homes." This assertion, in and of itself, is an insufficient basis upon which to find that a cable operator has made an affirmative decision to restrict its service area. As the Commission has stated, "[t]he fact that a franchise area has not yet been filled out by the construction of a system would not by itself be taken as redefining the service area."[15] As the Township offers no other evidence that C-TEC has redefined its franchise area, we conclude that the Township has not met its burden of proving that C-TEC has redefined its franchise area.

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[16] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by § 76.905 of the Commission's rules, is present within the franchise area.[17] C-TEC has met this burden. C-TEC has appropriately relied on data reflecting the number of households as required by our rules.[18] Relying on this data, C-TEC has submitted sufficient evidence demonstrating that its cable system serves fewer than 30 percent of the households within its franchise area.[19] Thus, we find that C-TEC's system serving Ashland Township is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED that the petition for reconsideration, filed by C-TEC Cable Systems of Michigan, Inc. challenging the certification of Ashland Township to regulate rates, IS GRANTED.

9. IT IS FURTHER ORDERED that the Certification of Ashland Township, Michigan to regulate the basic cable service rates of C-TEC Cable Systems of Michigan, Inc., IS RESCINDED.

10. This action is taken pursuant to delegated authority under § 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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12 *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164, 1180 (1993) (*"First Recon. Order"*).

13 *Id.*

14 *See First Recon. Order, supra.* Although for general purposes, it defined the "franchise area" as the area which a cable operator is authorized to serve, the Commission did indicate that a more restricted definition of "franchise area" may be appropriate under limited circumstances, such as when an operator "has itself, through its own conduct, self-defined the areas to be served to such an extent that this redefined area accurately portrays the operator's "franchise area." *Id*, at 1181. Under this standard, the franchising authority has the burden of showing that the operator has made an "affirmative decision... to restrict service." *Id.*

15 *First Recon. Order, supra.*

16 47. C.F.R. § 76.906.

17 47 C.F.R. § 76.911(b)(1).

18 *See Third Recon. Order, supra.*

19 Initially, in its petition for reconsideration, C-TEC stated that it served 41 of 833 homes in its franchise area. This "homes" data was apparently based on the number of housing units (occupied and vacant) in Ashland Township. In its supplement, however, C-TEC submitted data demonstrating that there are 669 occupied housing units in the franchise area. C-TEC also indicated that it currently serves 43, not 41, subscribers. In its November 30, 1994 response, C-TEC explained that "[a]ny differences in subscriber information supplied in C-TEC's original filings and C-TEC's supplemental filings are attributable to changes in the number of subscribers in the time between the original submission and the supplement. C-TEC updated subscriber information in its supplements so that the 'effective competition' analysis was based on the most recent information available." We will accept C-TEC's updated subscriber numbers as accurate. As C-TEC's supplement contains the appropriate housing and subscriber data, we have relied upon it for purposes of our analysis.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SHELBY CABLE, INC.

Petition for Revocation

of Certification of
the City of Hoover, Alabama (AL0221)
to Regulate Basic Cable Service Rates

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 13, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On February 3, 1994, Shelby Cable Inc., ("Shelby Cable") filed a petition for revocation challenging the certification of the City of Hoover, Alabama, ("Hoover") to regulate rates for basic cable service and associated equipment.[1] In addition, Shelby Cable, filed a supplement to its original petition, pursuant to a recent Commission Order.[2] Hoover filed an opposition[3] to which Shelby Cable filed a reply.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[4] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless the franchise authority has actual knowledge to the contrary.[5] Such certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[6] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the date such certification becomes effective.[7] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[8] After the 30-day deadline for filing petitions for reconsideration has elapsed, cable operators may challenge a franchising authority's certification by filing a petition for revocation.[9] However, regardless of its grounds, the filing of a petition for revocation, does not automatically trigger a stay of a franchising authority's power to regulate basic cable rates.[10]

II. DISCUSSION

3. In its petition, Shelby Cable states that its system serving the City of Hoover is subject to effective competition because the system serves fewer than 30 percent of the households within its franchise area.[11] Specifically, Shelby Cable states that it serves 315 of the 16,064 households

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[1] The City of Hoover filed its "Certification of Franchising Authority to Regulate Rates for Basic Cable Service and Initial Finding of Effective Competition" ("FCC Form 328") on September 1, 1993. Its certification became effective on October 1, 1993.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Hoover's opposition was untimely and, therefore, it also filed a "Special Waiver of the Deadline for Filing an Opposition to a Petition for Revocation of Certification." In its request for a waiver, Hoover argues that it did not file a timely opposition challenging Shelby Cable's petition because, it had not been "properly advised by the FCC to do so." Shelby Cable objects to the consideration of Hoover's petition, pointing to the Commission's warning in its *Effective Competition Order* that a franchising authority that had not filed a timely opposition to a petition for reconsideration or revocation may not use the supplement opportunity provided in the *Effective Competition Order* to do so. We will accept Hoover's opposition as we find that the Shelby Cable is not prejudiced by consideration of Hoover's arguments.

[4] 47 U.S.C. § 543(a)(4).

[5] 47 C.F.R. §§ 76.906, 76.910(b)(4).

[6] 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. § 76.910(b). *See also* 47 U.S.C. § 543(a)(4).

[7] 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[8] 47 C.F.R. § 76.911(c).

[9] 47 C.F.R. § 76.914. In its opposition, Hoover states that it failed to file a timely opposition because it was "confused" as to whether Shelby Cable intended to file a "petition for reconsideration" or a "petition for revocation." This confusion, Hoover claims, was the result of Shelby Cable's claim that it was subject to effective competition. Hoover suggests that under the Commission's rules, a cable operator may not claim the presence of effective competition in a revocation proceeding, but rather may only argue that the franchising authority has failed to adopt rules that are consistent with the Commission's rate regulations; that the franchising authority does not have legal authority or the personnel to administer rate regulations; or that the franchising authority has not adopted procedural laws and regulations applicable to rate regulation proceedings which provide a reasonable opportunity for consideration of the views of interested parties. We disagree with Hoover's suggestion that a cable operator may not raise an effective competition claim in a petition for revocation. Hoover points to nothing in our rules which prohibits such a claim.

[10] 47 C.F.R. § 76.914(d).

[11] The Commission's rules provide that only the rates of cable systems that are not subject to effective competition may be regulated. The Commission's rules further provide that a cable system is subject to effective competition if fewer than 30 percent of the households in the franchise area subscribe to the cable service system. 47 C.F.R. § 76.905(a) and (b)(1).

(that is, occupied housing units)[12] in the City of Hoover, or 2.0 percent of the total number of households. As supporting documentation, Shelby Cable provides 1990 Census data[13] which shows that there are 16,064 households in the City of Hoover. Shelby Cable also submits a computer print-out with sufficient subscriber information to support its claim that it serves 315 subscribers in the franchise area.

4. In its opposition, Hoover disputes Shelby Cable's claim that it is subject to effective competition. It argues that Shelby Cable actually serves 315 subscribers while its cable passes only 510 households in its franchise area. Thus, Hoover claims that Shelby Cable has a penetration level of 61.9 percent. Next, Hoover argues that Shelby Cable does not face effective competition from another multichannel video programming distributor. Accordingly, Hoover argues that Shelby Cable has failed to demonstrate that its cable system is subject to effective competition. In reply, Shelby Cable argues that Hoover misapplies the effective competition test. It contends that Hoover's argument is based on a "homes passed" test which is not the proper basis for determining the presence of effective competition under the "low penetration" test. Rather, Shelby Cable argues that this test is measured by the number of subscribers served by the cable system in question in relation to the total number of households in the franchise area.

5. As a preliminary matter, we find that Hoover's arguments lack merit. First, Hoover misapplies the "low penetration" test for effective competition upon which Shelby Cable is relying. As Shelby Cable correctly asserts, this test is based on the number of households within the franchise area and not the number of homes passed by the cable operator.[14] In addition, the low penetration standard for proving effective competition is based solely on the penetration level of the cable system in question. The existence of another competitor is irrelevant for purposes of this effective competition test.

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[15] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, exists in the franchise area.[16] Shelby Cable appropriately relied on data reflecting the number of households as required by our rules.[17] Relying on this data, Shelby Cable has submitted sufficient evidence demonstrating that its cable system serving Shelby County, its franchise area, serves 315 of the 16,064 households (that is, occupied housing units) in the City of Hoover, or 2.0 percent of the total number of households. Thus, we find that Shelby Cable's system serving the City of Hoover is subject to effective competition. Accordingly, its petition is granted.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the petition for revocation filed by Shelby Cable Inc., challenging the certification of the City of Hoover, Alabama, to regulate its basic cable service IS GRANTED.

8. IT IS FURTHER ORDERED that the certification granted to the City of Hoover, Alabama, to regulate Shelby Cable Inc's basic cable rates IS REVOKED.

9. This action is being taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[12] As the Commission stated recently, "we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census that would include vacant units." *Third Order of Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 9 FCC Rcd 4316, 4324 (1994) ("*Third Recon. Order*"). The count of "households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8.

[13] As the Bureau stated recently, 1990 Census data is an appropriate source for household data. *Effective Competition Order, supra.*

[14] *See First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, MM Docket No. 92-266, 9 FCC Rcd 1164 (1993).

[15] 47 C.F.R. § 76.906.

[16] 47 C.F.R. § 76.911(b)(1).

[17] *Third Recon. Order, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Comcast Cablevision of Tallahassee, Inc. Tallahassee, Florida — CUID No. FL0033

Benchmark Filing To Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: December 12, 1994; Released: December 13, 1994

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider a complaint about the price Comcast Cablevision of Tallahassee, Inc. ("Comcast") was charging for its cable programming service ("CPS") tier in Tallahassee, Florida, CUID No. FL0033. Comcast has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Comcast's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994, forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994, through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994, through a benchmark showing, operators must use the FCC Form 1200 series.[10]

PROCEDURAL MATTERS

4. The City of Tallahassee completed and served a valid CPS complaint on Comcast on September 15, 1993.[11] The Commission received the complaint on September 17, 1993.

5. Comcast filed its first FCC Form 393 in response to this complaint on November 16, 1993. Comcast amended its justification twice: on June 24, 1994, in response to an Order citing common deficiencies observed in benchmark filings generally;[12] and on November 22, 1994, in response to a Commission letter citing still unresolved deficiencies in Comcast's amended showing.[13]

DISCUSSION

6. Comcast asserts that its monthly CPS tier price of $11.52 per subscriber is justified by its benchmark filing, which shows a maximum permitted charge of $11.52. Upon review, however, we have determined that Comcast has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Comcast's calculations in its amended Form 393:[14]

a. Comcast's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) count channel 20 as a satellite channel. However, according to Comcast's November 22, 1994

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Comcast has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Comcast implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993)

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[11] The complaint was dated September 15, 1993, and states that it was mailed to Comcast on that date. Comcast has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider September 15, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] Letter from John M. Spencer to Donald R. Erickson, Vice President and Controller, Comcast Cable Communications, Inc. (November 14, 1994).

[14] With respect to the regulatory status of Comcast's *a la carte* package, this issue is addressed in another Bureau Order. *See Comcast Cablevision, Tallahassee, Florida*, LOI-93-2, DA 94-1275 (Cab. Serv. Bur., released Nov. 18, 1994).

amendment, channel 20 carried local origination programming 12 hours per day and a satellite service only 12 hours per day.

Our policy on "split" channels is to categorize them according to their preponderance of use. This policy isbased on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. Under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or not subject to rate regulation and as either satellite or non-satellite. A "channel" is defined as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. The preponderance-of-use test is the only one consistent with this conceptual framework.[15] Because channel 20 did not carry rate-regulated satellite programming during the majority of programming hours, we therefore adjust the number of 1992 rate-regulated satellite channels from 22 to 21. This adjustment reduces the benchmark channel rate entered on Line 220 of Worksheet 2.

b. Comcast's calculations on Form 393, Part II, Worksheet 2 also count channel 21 as a rate-regulated, non-satellite channel as of September 30, 1992. However, Comcast's November 22, 1994 amendment indicates that channel 21 was shared as of that date between rate-regulated local access programming and pay-per-view programming that is not subject to rate regulation. Despite a specific request by the Commission,[16] Comcast failed to show that channel 21 was used preponderantly for rate-regulated programming. We therefore adjust the number of channels on the CPS tier as of September 30, 1992 from 20 to 19.

c. Similarly, in its November 22, 1994 amendment, Comcast treats channels 20 and 21 as satellite channels as of the initial date of regulation, although it has not shown that either of these channels carried rate-regulated satellite-delivered programming during the majority of programming hours. Channel 20 carried local origination programming 12 hours per day and rate-regulated satellite programming only 12; and Comcast has not explained the basis on which channel 21 was divided between pay-per-view programming not subject to rate regulation and rate-regulated satellite programming. We therefore adjust the number of satellite channels reflected in Worksheet 1 of Form 393 from 19 to 17, reducing the benchmark channel rate entered on Line 121 of Worksheet 1.

d. Comcast's calculations for its rate-regulated package as of the initial date of regulation (Form 393, Part I, and Form 393, Part II, Worksheet 1) count channel 21 as a rate regulated channel in the CPS tier, although channel 21 was divided between pay-per-view programming not subject to rate regulation and rate-regulated programming on a basis that Comcast failed to explain. For the same reason noted above, we therefore reduce the number of CPS-tier channels from 17 to 16.

e. In its amended Form 393 filing, Comcast calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of October 1993 using data released by the U.S. Department of Commerce on August 31, 1993. However, Comcast's use of October 1993 as the date through which it calculated the inflation adjustment is impermissible. Comcast was required to file a justification of its CPS price no later than October 15, 1993.[17] If Comcast had filed its justification in a timely fashion, the instructions to Form 393 would have required it to calculate the inflation adjustment only through September 1993.[18] Comcast cannot be permitted to claim an additional inflation adjustment due to its decision to file its response late. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Comcast should have filed.[19] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.028 as the Inflation Adjustment Factor through September 1993.

7. Because of these errors, we conclude that Comcast has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $11.52 to $10.81.

CONCLUSIONS

8. Upon review of the record herein, we conclude that Comcast's showing supports a maximum reasonable CPS tier price of $10.81 per month (plus franchise fee) for the period September 17, 1993 to May 14, 1994.[20] We further determine that we will order appropriate refunds pursuant

[15] *See Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

[16] Letter from John M. Spencer to Donald R. Erickson, Vice President and Controller, Comcast Cable Communications, Inc., Attachment B, para. 2 (November 14, 1994).

[17] 47 C.F.R. §76.956(a) (operator must file a response within 30 days of the date of service of a complaint).

[18] FCC Form 393, page 11, instructions for line 124 (Inflation Adjustment Factor hhis calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[19] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, *rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[20] This finding is based solely on the representations of Comcast listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra* . Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the September 15, 1993 complaint against the cable programming service price charged by Comcast Cablevision of Tallahassee, Inc. in Tallahassee, Florida, CUID No. FL0033, IS GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, that the benchmark filing submitted by Comcast Cablevision of Tallahassee, Inc. with respect to the City of Tallahassee, Florida, CUID No. FL0033, for the period of September 17, 1993 to May 14, 1994, justifies a maximum price of $10.81 per month (plus franchise fee) for Comcast Cable Communications, Inc.'s cable programming service tier.

11. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Comcast Cablevision of Tallahassee, Inc. shall refund to subscribers that portion of the amounts paid for CPS service from September 17, 1993[21] to May 14, 1994, that exceeded $10.81 per month (plus franchise fee), and was thus unreasonable, plus interest to the date of the refund.

12. IT IS FURTHER ORDERED, that Comcast Cablevision of Tallahassee, Inc. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[21] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Comcast Cablevision — LOI-93-3
Howard County, Maryland

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In a letter to the Commission dated September 20, 1993, the Office of the Cable Administrator of Howard County, Maryland alleged violations by Comcast Cablevision of Howard County, Maryland ("Comcast") of Commission regulations governing the provision of cable television service. In response to this complaint, the Commission issued Letter of Inquiry 93-3 ("LOI") to Comcast on November 17, 1993.[1] The LOI asked Comcast to provide information concerning, among other issues, its new four channel offering.[2] Comcast responded to our LOI on December 16, 1993.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Tom Beach, Manager, Comcast Cable of Howard County, Maryland, LOI-93-3 (November 17, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Comcast. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Comcast to make refunds to subscribers in regard to Comcast's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] The LOI also requested information concerning Comcast's cable maintenance insurance charge for in-home wiring and negative option billing. This Order addresses only the regulatory status of Comcast's package. Other issues in the LOI will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623(a)(2), 47 U.S.C. § 543(a)(2) (1992).

[4] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623(b)(7)(A)(ii-iii), 47 U.S.C. § 543(b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 § 623(b)(1), 47 U.S.C. § 543(b)(1).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[9] Communications Act of 1934 § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

[11] H.R. Rep. No. 628 at 79.

[12] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[13] *Rate Order* ¶ 451.

practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Comcast indicates that its services included an 18-channel basic tier, called Limited Service, for $7.95 per month and an 18-channel cable programming service tier, called Satellite Service, for $15.45 per month. Both tiers of service could be purchased together as a package, called Preferred Basic Service, for $23.40 per month.

7. The following chart summarizes Comcast's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Limited Service	18	$ 7.95
2. Satellite Service	18	$15.45
TOTAL (Preferred Basic Service)	36	$23.40

8. Beginning September 1, 1993, the date our rate regulations became effective, Comcast restructured its service offerings. Comcast's restructured service offerings included a 17-channel basic tier, called Limited Basic Service, for $9.96 per month and a 21-channel cable programming service tier, called Standard Service, for $12.30 per month. Comcast states that it also began offering four channels on an individual and package basis. The four channels were Turner Network Television ("TNT"), WTBS, WOR and The Sci-Fi Channel. Two of these channels, WTBS and WOR, were originally contained in Comcast's Limited Service tier and one channel, TNT, was previously included in Comcast's Satellite Service tier. Comcast indicates that it did not offer The Sci-Fi Channel prior to September 1, 1993.

9. Comcast states that WTBS, WOR and The Sci-Fi Channel could be purchased individually for $0.29 per month and TNT could be purchased individually for $0.44 per month. All four channels could be purchased as a package, called Value Pac, for $0.57 per month.

10. The following chart summarizes Comcast's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Limited Basic Service	17	$ 9.96
2. Standard Service	21	$12.30
3. Value Pac	4	$ 0.57 (if purchased package)
TOTAL	42	$22.83 [15]

11. Comcast indicates that customers who had previously received both the Limited Service and the Satellite Service were automatically subscribed to the Value Pac on September 1, 1993. Comcast also indicates that customers who had previously received only the Limited Service did not automatically receive any of the four channels as of September 1, 1993.

12. Comcast argues, *inter alia*, that it began offering its services individually and through the Value Pac package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. Comcast's response indicates that, as of December 16, 1993, no more than .1% of its pre-September 1, 1993, subscribers in Howard County have chosen to drop the Value Pac and take individual channels.

IV. DISCUSSION

13. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[16] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[17] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[18] First, we examine whether Comcast's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

14. Comcast's restructuring, effective September 1, 1993, involved its movement of two channels (WTBS and WOR) from its 18-channel Limited Service tier, one channel (TNT) from its 18-channel Satellite Service tier and the addition of one channel (The Sci-Fi Channel) to create the four-channel package that it alleges is not rate-regulated. Thus, Comcast removed three channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Comcast avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Comcast had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, Preferred Basic Service customers who were previously receiving three of the four channels at issue continued to receive them in the package after the restructuring, and there appears to be no sufficient justification for Comcast's restructuring other than to avoid rate regulation.

15. Other factors corroborate our view that Comcast's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it automatically subscribed its Preferred Basic Service customers to the offerings that previously had been part of its basic and cable programming service tiers. In light of these facts, it appears that Comcast's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however,

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[14] This Order does not evaluate Comcast's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[15] This total amount does not include the $0.18 charge per month for CableGuard, Comcast's cable maintenance insurance charge for in-home wiring.

[16] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h) (1992).

[17] *Rate Order* ¶ 451.

[18] *Id.* at ¶ 453.

if Comcast's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Comcast would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[19]

16. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[20] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[21] This is not the type of offering that Comcast and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from tiers that would be subject to our rate regulations.

17. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[22]

18. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the four services because subscribers may purchase three of the channels for $0.29 each and the fourth channel for $0.44 or the four-channel package for $0.57. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Comcast's submission reveals that, as of December 16, 1993, no more than .1% of Comcast's pre-September 1, 1993, subscribers have chosen to drop the Value Pac and take individual channels. Although only .1% of Comcast's pre-September 1, 1993, subscribers have opted to drop the a la carte package, our test does not specify what number would indicate that an offering is "a realistic service offering." However, this fact, together with the other factors present in this case,[23] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

19. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*, [24] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Comcast's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (75 percent) was removed from regulated tiers, the absolute number (three) was small.[25] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Comcast that its restructuring was not a permissible a la carte package.

20. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[26] Our exper-

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[19] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id* at ¶46. However, in order to determine whether Comcast evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[20] *Rate Order* ¶ 329.

[21] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[22] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 1

94. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[23] *See, e.g.*, ¶ ¶ 14-15, *supra*.

[24] *Second Reconsideration Order* at ¶ 196.

[25] *Id.*

[26] *See Going Forward Order* at ¶40.

ience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Comcast's restructuring was not a permissible a la carte package.

21. For that reason, we do not think that it would be equitable to subject Comcast to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[27] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, Comcast removed only three channels from regulated tiers and attempted to treat only four channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[28] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[29]

22. We will not require Comcast to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[30] Instead, on a prospective basis, we will consider Comcast's collective offering of a la carte channels a new product tier[31] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Comcast's four-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Comcast or its Howard County customers to the confusion and transaction costs that would result if we required Comcast to retier.

V. ORDERING CLAUSES

23. Accordingly, IT IS ORDERED that Comcast's package, as it existed on November 17, 1993, may be treated as a new product tier under our *Going Forward Order*.

24. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[27] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[28] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[29] *Second Reconsideration Order* ¶ 196.

[30] We are not precluding Comcast from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[31] *See Going Forward Order* ¶ ¶16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cablevision Industries LOI 93-40
Long Beach, CA

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a Form 329 Complaint on October 26, 1993, concerning the reasonableness of the rates charged for cable programming services by Cablevision Industries of Long Beach ("CVI"). In response to this complaint, the Commission issued Letter of Inquiry 93-40 ("LOI") to CVI on December 13, 1993.[1] The LOI asked CVI to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. CVI responded to our LOI on January 11, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[2] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[3]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[4] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[5] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[6] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[7] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[8] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[9] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[10] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[11]

5. In the *Rate Order* the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[12] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Cablevision Industries, LOI-93-40 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. We also note that there is a pending rate complaint proceeding involving CVI. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order CVI to make refunds to subscribers in regard to CVI's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] Communications Act of 1934 § 623 (a)(2), 47 U.S.C. § 543 (a)(2)(1992).

[3] Pub. L. No. 102-385 § 2 (b) (4) (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[4] Communications Act of 1934 §623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii)(1992); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[5] Communications Act of 1934 § 623 (b)(1), 47 U.S.C. § 543 (b)(1)(1992).

[6] *Id.*

[7] Communications Act of 1934 §623(1)(2), 47 U.S.C. §543(1)(2)(1992).

[8] Communications Act of 1934 §623 (c)(1)(A), 47 U.S.C. §543 (c)(1)(A)(1992). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[9] Communications Act of 1934 §623(h), 47 U.S.C. §543(h)(1992).

[10] H.R. Rep. No. 628, 102d Cong., 2d Sess. at 79 (1992).

[11] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).

[12] *Rate Order* ¶ 451.

III. FACTS

6. Before September 1, 1993, CVI's services included a 26 channel basic tier, called Basic Reception Service, for $12.95 per month, and a 26 channel cable programming service tier, called Programming Service, for $14.00 per month. CVI's customers could receive a total of 52 channels for $26.95 per month.

7. The following chart summarizes CVI's service tier options prior to September 1, 1993:

Offering	Channels	Price
1. Basic Reception Service	26	$12.95
2. Programming Service Tier	26	$14.00
TOTAL	52	$26.95

8. On September 1, 1993, the date our rate regulations became effective, CVI states that it moved five channels, American Movie Classics (AMC), The Nashville Network (TNN), Cable News Network, (CNN), Turner Network Television (TNT) and The Discovery Channel (Discovery) from its Programming Service Tier, and offered the channels to its subscribers on an individual or package basis through the Expanded Program Package. CVI states that CNN, TNT and Discovery could be purchased individually for $1.95 each and that TNN and AMC could be purchased for $1.25 each, or all five channels could be purchased as a package for $4.55 per month. CVI also changed its Basic Reception Service rate to $13.95 and its Programming Service tier rate to $7.65. In addition, it appears that its Programming Service customers continued to receive the channels through the Expanded Program Package. CVI's restructuring allowed customers to receive 53 channels at a total price of $26.15 per month.[13]

9. The following chart summarizes CVI's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Basic Reception Service	31	$13.95
2. Programming Service	17	$ 7.65
3. Expanded Program Package	5	$ 4.55
TOTAL	53	$26.15 (if purchased package)

10. CVI argues, *inter alia*, that it began offering its services individually and through its Expanded Program Package in order to implement Congress' intent to maximize consumer choice. However, based on this record, very few consumers elected to exercise that choice. CVI's response provides a breakdown of its subscribers who chose the package of individual channels. Of 63,267 total subscribers receiving both the Basic Reception Service and the Programming Service Tier, 63,138 or 99 percent, subscribe to the Expanded Program Package; only 40 subscribers, or significantly less than one percent, subscribe to one or more of the individual a la carte channels.

IV. DISCUSSION

11. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[15] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[16] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[17] First, we examine whether CVI's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

12. CVI's restructuring effective September 1, 1993, involved its movement of five channels, TNN, CNN, TNT, AMC and Discovery, from its Programming Service tier to create the five-channel package that it alleges is not rate-regulated. Thus, CVI removed channels from an otherwise rate-regulated tier to create a new package of channels. In so doing, CVI avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if CVI had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers that were receiving the Programming Service tier apparently continued to receive the five channels at issue after the restructuring, and there appears to be no sufficient justification for CVI's restructuring other than to avoid rate regulation.

13. Other factors corroborate our view that CVI's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it appears that CVI automatically subscribed its Programming Service customers to the offerings that previously had been part of its Programming Service Tier. In light of these facts, it appears that CVI's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if CVI's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met the Commission's requirements for a permissible collective offering of a la carte channels, then CVI would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[18]

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[13] CVI notes that, at the time of its response, it was in the process of announcing a second phase of price adjustments and would be resetting the rates for its a la carte offering. CVI does not specify the amount of these rate changes, however, the changes are not material to the decisions reached in this order.

[14] This order does not evaluate CVI's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in separate proceedings.

[15] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h)(1992).

[16] *Rate Order* ¶ 451.

[17] *Id.* at ¶ 453.

[18] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*.

14. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[19] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[20] This is not the type of offering that CVI and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

15. Moreover, in the *Rate Order*, the Commission determined that a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[21]

16. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the five services, because subscribers may purchase CNN, TNT and Discovery for $ 1.95 per channel, and TNN and ABC for $ 1.25 per channel, or the five channel package for $ 4.55. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." The results of our review of CVI's submission reveal that only 155 of CVI's subscribers in Long Beach chose not to subscribe to the Expanded Program Package. Although significantly less than one percent of CVI's subscribers chose not to subscribe to the Expanded Program Package, our test does not specify what percentage would indicate that an offering is "a realistic service offering." However, this fact, together with the other factors present in this case,[22] tends to show that the per-channel offering, in this instance, does not constitute a realistic service offering.

17. Even if we were to apply the 15 interpretative guidelines set forth in our *Second Reconsideration Order*,[23] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that CVI's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from a regulated tier, the absolute number (five) was small.[24] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to CVI that its restructuring was not a permissible a la carte package.

18. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order*'s two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered an evasion of rate regulation.[25] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that CVI's restructuring was not a permissible a la carte package.

19. For that reason, we do not think that it would be equitable to subject CVI to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[26] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation. In contrast, CVI attempted to treat only five channels

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Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. However, in order to determine whether CVI evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[19] *Rate Order* ¶ 329.

[20] *See, e.g., Rate Order* at ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[21] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report & Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) ("*Second Reconsideration Order*"), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 interpretive guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[22] *See* ¶ ¶ 12-13, *supra*.

[23] *Second Reconsideration Order* ¶ 196.

[24] *Id.*

[25] *See Going Forward Order* ¶ 40.

[26] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1227 (released November 18, 1994).

as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were, in many instances, unclear, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[27] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[28]

20. We will not require CVI to restructure its tiers so as to return the channels offered in the a la carte package to a regulated tier,[29] instead, on a prospective basis, we will consider CVI's collective offering of a la carte channels a new product tier[30] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because CVI's five-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject CVI or its Long Beach customers to the confusion and transaction costs that would result if we required CVI to retier.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that CVI's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

22. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[27] *Rate Order*, 8 FCC Rcd 5837 n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[28] *Second Reconsideration Order* ¶ 196.

[29] We are not precluding CVI from treating this package as a cable programming service tier, priced pursuant to our rules, for from putting the channels back into an existing tier.

[30] *See Going Forward Order* ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Cable TV of Greater San Juan LOI-93-38
San Juan, Puerto Rico

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a Form 329 Complaint on October 19, 1993, concerning the reasonableness of the rates charged for cable programming services by Cable TV of Greater San Juan ("Cable San Juan"), a cable operator serving San Juan, Puerto Rico.[1] In response to this complaint, the Commission issued Letter of Inquiry 93-38 ("LOI") to Cable San Juan on December 13, 1993.[2] The LOI asked Cable San Juan to provide information concerning its compliance with the Commission's rules governing evasion in the offering of packages which allegedly are not rate-regulated. Cable San Juan responded to our LOI on January 12, 1994.[3]

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[4] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[5]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[6] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[7] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[8] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[9] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[10] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

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[1] Cable TV of Greater San Juan is owned by Century-ML Cable Corporation, a subsidiary of a joint venture owned in equal parts by Century Communications Corp. and ML Media, L.P. We note that the provisions of the Communications Act of 1934, as amended, and its implementing regulations apply to cable television providers in Puerto Rico because it is a territory of the United States. *See* 47 U.S.C. §§ 152(a) and 153(g) (1993).

[2] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Cable TV of Greater San Juan, Puerto Rico, LOI-93-38 (December 13, 1993). Copies of the Letter of Inquiry and Response are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 399, Washington, D.C. We also note that there is a pending rate complaint proceeding involving Cable San Juan. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Cable San Juan to make refunds to subscribers in regard to Cable San Juan's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[3] In its response, Cable San Juan asserted that because fewer than 30 percent of the households in its franchise area subscribe to its cable service, it is subject to effective competition and, therefore, its rates are unregulated. *See* 47 C.F.R. § 76.905(a) and (b)(1) (1994). However, except for an unsupported statement that 46,861 of the 167,979 households in the San Juan franchise area subscribe, Cable San Juan has made no attempt to rebut the presumption that it is *not* subject to effective competition. *See* 47 C.F.R. §76.906. More importantly, Cable San Juan has not filed a petition for reconsideration of its local franchising authority's certification, a petition for revocation of certification, or a motion to dismiss the cable programming service rate complaints pending against it on grounds of the alleged existence of effective competition in the franchise area. These are the primary methods set forth in our rules for establishing and determining such claims. *See e.g.* 47 C.F.R. §§76.911 and 76.914. As a result, we will continue to presume that Cable San Juan is not subject to effective competition until the company demonstrates otherwise in accordance with the processes set forth in our rules. This LOI is not the appropriate vehicle for the hearing and resolution of this issue.

[4] Communications Act of 1934, as amended, § 623(a)(2), 47 U.S.C. § 543(a)(2) (1992).

[5] Pub. L. No. 102-385 § 2 (b) (4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[6] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[7] Communications Act of 1934 § 623(b)(1), 47 U.S.C. § 543(b)(1).

[8] *Id.*

[9] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[10] Communications Act of 1934 § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[11] The 1992 Cable Act's legislative history states that the Commission should scrutinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[12] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[13]

5. In the *Rate Order*, the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[14] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Cable San Juan's services included a 19 channel basic tier, called Basic Service, for $15.95 per month, a 19 channel cable programming service tier, called the Silver tier, for $7.25 per month, and an additional 9 channel cable programming service tier, called the Gold tier, for $4.40 per month. In order to receive the Gold tier, subscribers were required to purchase both the Basic Service and the Silver tier.

7. The following chart summarizes Cable San Juan's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic Service	19	$15.95
2. Silver tier	19	$ 7.25
3. Gold tier	9	$ 4.40
Total	47	$27.60

8. Beginning September 1, 1993, the date our rate regulations became effective, Cable San Juan restructured its service offerings. Cable San Juan's restructured service offerings included a 44 channel basic tier, called Basic Service, for $28.17 per month and it states that three channels were offered on an individual or package basis. The three channels were WABC-TV, WRAL-TV and WXIA-TV. All three channels were originally in Cable San Juan's Silver tier.

9. Cable San Juan states that the three a la carte channels could be purchased individually for $0.72 per month. All three channels could be purchased as a package, called Cable Select, for $1.55 per month.

10. The following chart summarizes Cable San Juan's service tier options as of the date of its response to our LOI:[15]

Offering	Channels	Price
1. Basic Service	44	$28.17
2. Cable Select	3	$ 1.55
Total	47	$29.72

11. Cable San Juan argues, *inter alia*, that it began offering its services individually and through the Cable Select package in order to implement Congress' intent to maximize consumer choice. However, based on the record, very few consumers elected to exercise that choice. As of January 7, 1994, Cable San Juan states that only 16 subscriptions to individual channels were made, while 94,277 subscribers took the Cable Select package.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[16] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[17] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[18] First, we examine whether Cable San Juan's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Cable San Juan's restructuring, effective September 1, 1993, involved its movement of three channels (WABC-TV, WRAL-TV and WXIA-TV) from its 19-channel Silver tier to create the three-channel package that it alleges is not rate-regulated. Thus, Cable San Juan removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Cable San Juan avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Cable San Juan had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers who were receiving the three Silver tier channels at issue apparently continued to receive them after the restructuring, and there appears to be no sufficient justification for Cable San Juan's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that Cable San Juan's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it appears that Cable San Juan automatically subscribed its Silver tier customers to the offerings that previously had been part of its cable programming service tiers. In light of these facts, it appears

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[11] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).
[12] H.R. Rep. No. 628 at 79.
[13] S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).
[14] *Rate Order* ¶ 451.
[15] This Order does not evaluate Cable San Juan's rates for its Basic Service. These rates are subject to review by the local franchising authority in a separate proceeding.
[16] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).
[17] *Rate Order* ¶ 451.
[18] *Id.* at ¶ 453.

that Cable San Juan's restructuring of its offerings may have evaded rate regulation. We will not find an actual evasion occurred, however, if Cable San Juan's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Cable San Juan would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[19]

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[20] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[21] This is not the type of offering that Cable San Juan and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[22]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the three services, because subscribers may purchase the three channels for $0.72 each or the three-channel package for $1.55. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Cable San Juan's submission reveals that of the 94,293 subscribers who requested either individual channels or the Cable Select package, only 16 subscriptions to individual channels are reported. Based on these figures, assuming a best case scenario for Cable San Juan, about .02 percent of subscribers to these channels elected to subscribe to individual channels. This analyzes the facts most favorably to Cable San Juan because fewer than 16 may have subscribed to individual channels. Our test does not specify what number would indicate that an offering is "a realistic service offering." However, the fact that such a low percentage of subscribers opted for individual channels rather than the package, together with the other factors present in this case,[23] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[24] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Cable San Juan's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (three) was small.[25] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Cable San Juan that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was

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[19] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) (*"Going Forward Order"*). Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶46. However, in order to determine whether Cable San Juan evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[20] *Rate Order* ¶ 329.

[21] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[22] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) (*"Second Reconsideration Order"*), the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an "evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[23] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[24] *Second Reconsideration Order* at ¶ 196.

[25] *Id.*

permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering, and, hence, not an evasion of rate regulation.[26] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Cable San Juan's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject Cable San Juan to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[27] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation, while here, Cable San Juan eliminated two cable programming service tiers but moved most of the channels from those tiers into the rate-regulated basic tier. Cable San Juan attempted to treat only three channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[28] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[29]

21. We will not require Cable San Juan to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[30] Instead, on a prospective basis, we will consider Cable San Juan's collective offering of a la carte channels a new product tier[31] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Cable San Juan's three-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Cable San Juan or its customers to the confusion and transaction costs that would result if we required Cable San Juan to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Cable San Juan's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[26] *See Going Forward Order* at ¶ 40.

[27] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[28] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[29] *Second Reconsideration Order* ¶ 196.

[30] We are not precluding Cable San Juan from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[31] *See Going Forward Order* at ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Century Cable TV	LOI-93-44
Brunswick, Georgia	LOI-94-4

Letter of Inquiry

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1994; Released: December 12, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission received a Form 329 Complaint on October 25, 1993, concerning the reasonableness of the rates charged for cable programming services by Century Cable TV of Brunswick, Georgia ("Century"). In response to this complaint, the Commission issued Letter of Inquiry 93-44 ("LOI") to Century on December 13, 1993.[1] The LOI asked Century to provide information concerning, among other issues, certain rate and service changes made in anticipation of and/or in response to rate regulation, including the offering of channels on an individual and package basis.[2] Century responded to our LOI on January 12, 1994.

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Cable Act"), Congress created a regulatory scheme giving the Commission and local franchising authorities jurisdiction over the cable programming and equipment rates of non-competitive cable systems. The 1992 Cable Act provides that the rates of cable systems not subject to effective competition may be regulated by local franchising authorities, in the case of basic service, and by the Commission, in the case of cable programming services.[3] A stated policy of the 1992 Cable Act is to ensure that "consumer interests are protected in the receipt of cable service."[4]

3. The 1992 Cable Act requires cable operators to offer subscribers a basic tier that must contain at least all qualified local broadcast signals and, unless otherwise specified by the local franchising authority, public, educational, and governmental channels.[5] The Commission was charged by the 1992 Cable Act with creating regulations that ensure that the rates for the basic service tier are reasonable.[6] The 1992 Cable Act directs that "[s]uch regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."[7] Under the 1992 Cable Act, operators may offer other channels in a cable programming service tier or tiers.[8] The 1992 Cable Act orders the Commission to create regulations for the cable programming service tiers that allow it to identify individual cases of unreasonable rates.[9] The 1992 Cable Act thus protects consumers' interests in continuing to receive the basic service tier and cable programming service tiers at reasonable rates.

4. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[10] The 1992 Cable Act's legislative history states that the Commission should scru-

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[1] Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Century Cable TV of Brunswick, Georgia, LOI-93-44 (December 13, 1993). In a letter received by the Commission, dated November 24, 1993, the City of Brunswick alleged violations by Century of Commission regulations governing the provision of cable television service. In response to this complaint, the Commission issued Letter of Inquiry 94-4 to Century on February 22, 1994. *See* Letter from Alexandra M. Wilson, Acting Chief, Cable Services Bureau, FCC, to Century Communications Corp. of Brunswick, Georgia, LOI-94-4 (February 22, 1994). Century responded to LOI-94-4 on March 24, 1994. Copies of the Letters of Inquiry and Responses are available to the public in the FCC's Cable Reference Center, 2033 M Street, N.W., Room 333, Washington, D.C. Because LOI-93-44 and LOI-94-4 requested information concerning the same cable system, we have consolidated the two inquiries for purposes of this Order. We also note that there is a pending rate complaint proceeding involving Century. Our decisions made herein will be made a part of that proceeding. Thus, for example, we will not order Century to make refunds to subscribers in regard to Century's purported "a la carte" restructuring. Obviously, however, we may order refunds if we find violations of other rules that should result in refunds.

[2] LOI-94-4 requested information concerning Century's compliance with regulations governing the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Order*, 8 FCC Rcd 2921 (1993) (*"Rate Freeze Order"*), *clarified*, 8 FCC Rcd 2917, 58 FR 21929 (April 26, 1993); *extended*, FCC 93-304 (released June 15, 1993), 58 FR 33560 (June 18, 1993), *Erratum*, 8 FCC Rcd 4511 (1993); *extended*, FCC 93-494 (released November 10, 1993), 58 FR 60141 (November 15, 1993); *extended*, 9 FCC Rcd 1299, 59 FR 6901 (February 14, 1994). This Order addresses only the regulatory status of the package. Other issues in the LOIs will be dealt with subsequently.

[3] Communications Act of 1934, as amended, § 623(a)(2), 47 U.S.C. § 543(a)(2) (1992).

[4] Pub. L. No. 102-385 § 2(b)(4), 106 Stat. 1460 (1992); *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. at 34 (1992).

[5] Communications Act of 1934 § 623 (b)(7)(A)(ii-iii), 47 U.S.C. § 543 (b)(7)(A)(ii-iii); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ ¶ 157-161 (1993) (*"Rate Order"*) (franchising authorities may require operators to carry PEG channels on tiers other than basic).

[6] Communications Act of 1934 §623 (b)(1), 47 U.S.C. § 543(b)(1).

[7] *Id.*

[8] Communications Act of 1934 § 623(l)(2), 47 U.S.C. § 543(l)(2).

[9] Communications Act of 1934 § 623(c)(1)(A), 47 U.S.C. § 543(c)(1)(A). Identification of individual cases of unreasonable rates is achieved by a process in which the Commission assumes jurisdiction over systems where a complaint about a cable programming service tier rate is filed.

[10] Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).

tinize offerings of non-traditional stand-alone services to "prevent repricing, retiering, or other alterations of rate structures" that could have the effect of evading the purposes of rate regulation.[11] This provision in the 1992 Cable Act is intended to give the Commission the authority to address changes in the cable industry's business practices that would thwart the intent of rate regulation.[12]

5. In the *Rate Order*, the Commission defined evasion as "any practice or action which avoids the rate regulation provisions of the Cable Act or Commission rules contrary to the intent of the Act or its underlying policies."[13] We must scrutinize a particular operator's marketing or pricing practices to determine whether those practices have the effect of avoiding the requirements of our rate regulations, contrary to the intent of the 1992 Cable Act and our rules.

III. FACTS

6. Before September 1, 1993, Century's services included a 24 channel basic tier, called Basic Service, for $11.95 per month, a 12 channel cable programming service tier, called the Silver tier, for $3.00 per month, and an additional 19 channel cable programming service tier, called the Gold tier, for $2.00 per month. In order to receive the Gold tier, subscribers were required to purchase both the basic tier and the Silver tier.

7. The following chart summarizes Century's service tier offerings prior to September 1, 1993:

Offering	Channels	Price
1. Basic Service	24	$11.95
2. Silver tier	12	$ 3.00
3. Gold tier	19	$ 2.00
Total	55	$16.95

8. Beginning September 1, 1993, the date our rate regulations became effective, Century restructured its service offerings. Century's restructured service offerings included a 49 channel basic tier, called Basic Service, for $17.41 per month and it states that six channels were offered on an individual or package basis. The six channels were Turner Network Television (TNT), Cable News Network (CNN), The Nashville Network (TNN), TBS, WGN and WWOR. TBS, WGN and WWOR were originally in Century's Basic tier and TNT, CNN and TNN were originally in Century's Silver tier.

9. Century states that the six a la carte channels could be purchased individually for $0.55 per month. In addition, all six channels could be purchased as a package, called Century Select, for $3.00 per month.

10. The following chart summarizes Century's service tier options as of the date of its response to our LOI:[14]

Offering	Channels	Price
1. Basic Service	49	$17.41
2. Century Select	6	$ 3.00
Total	55	$20.41

11. Century argues, *inter alia*, that it began offering its services individually and through the Century Select package in order to implement Congress' intent to maximize consumer choice. As of the date of its response, Century states that 2,113 subscriptions to individual channels were made, while 19,815 subscribers took the Century Select package.

IV. DISCUSSION

12. The 1992 Cable Act requires the Commission to adopt standards and guidelines to prevent evasions, "including evasions that result from retiering."[15] An evasion, as defined by the Commission, is an act or practice that "avoids the rate regulation provisions of the [Cable] Act or our rules contrary to the intent of the Act or its underlying policies."[16] In the *Rate Order*, we stated that "retiering otherwise permitted under our rules will not be deemed an evasion."[17] First, we examine whether Century's response to the LOI shows that its restructuring of its offerings had the effect of evading rate regulation for the channels that Congress intended to be rate-regulated.

13. Century's restructuring effective September 1, 1993, involved its movement of three channels (TBS, WGN and WWOR) from its 24 channel Basic service tier and three channels (TNT, CNN and TNN) from its 12 channel Silver tier to create the six-channel package that it alleges is not rate-regulated. Thus, Century removed channels from otherwise rate-regulated tiers to create a new package of channels. In so doing, Century avoided application of our rate regulations which generally required cable operators to reduce rates by about 10 percent. That is, if Century had not restructured on September 1, 1993, it would have been required to recalculate its rates in accordance with the *Rate Order* we released on May 3, 1993, which generally required cable operators to reduce their rates. Moreover, customers who were receiving the three Basic service tier channels and the three Silver tier channels at issue apparently continued to receive them after the restructuring, and there appears to be no sufficient justification for Century's restructuring other than to avoid rate regulation.

14. Other factors corroborate our view that Century's restructuring may have had the effect of avoiding rate regulation. First, it offered this package on the eve of regulation. Second, it appears that Century automatically subscribed its customers to the offerings that previously had been part of its cable programming service tiers. In light of these facts, it appears that Century's restructuring of its offerings may have evaded rate regulation. We will

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11 H.R. Rep. No. 628 at 79.
12 S. Rep. No. 92, 102d Cong., 2d Sess. at 77 (1992).
13 *Rate Order* ¶ 451.
14 This Order does not evaluate Century's rates for its basic and cable programming service tiers. These rates are subject to review by the local franchising authority and the Commission in a separate proceeding.
15 Communications Act of 1934 § 623(h), 47 U.S.C. § 543(h).
16 *Rate Order* ¶ 451.
17 *Id.* at ¶ 453.

not find an actual evasion occurred, however, if Century's action complied with our a la carte policy that was in effect at the time of its restructuring. If the offering met our requirements for a permissible collective offering of a la carte channels, then Century would not have evaded our rate regulations because it would not be required to reduce its price for the collective a la carte package.[18]

15. In our *Rate Order*, the Commission recognized that "a la carte packages" appear to be "cable programming services," but said that "interpreting the statute in such a literal fashion could disadvantage consumers by denying them discounts on packages of per-channel or per-program services and by limiting subscriber access to a greater quantity of premium programming."[19] Thus, we envisioned that cable operators, for the most part, would offer channels that previously had been offered a la carte in discounted packages, and concluded that it would be better for consumers if we construed the 1992 Cable Act to permit such discounting.[20] This is not the type of offering that Century and others have provided their subscribers. Specifically, these operators did not offer a discounted package of channels that previously had been offered a la carte to subscribers, but instead removed channels from a tier that would be subject to our rate regulations.

16. Moreover, in the *Rate Order*, the Commission determined that such a la carte packages would be exempt from rate regulation, i.e., would be deemed not to fall within the definition of "cable programming service," if two conditions were met: (1) the price for the combined package must not exceed the sum of the individual charges for each component service; and (2) the cable operator must continue to provide the component parts of the package to subscribers separately in addition to the package. The Commission said that the second condition would be satisfied only when "the per channel offering provides consumers with a realistic service choice."[21]

17. Under the two-part test that we set forth in the *Rate Order*, it is clear, first, that the price for the combined package does not exceed the sum of the individual charges for the four services, because subscribers may purchase the six channels for $0.55 each or the six-channel package for $3.00. The second part of the test is whether the separate parts of the package constitute a "realistic service offering." Our review of Century's submission reveals that of the 21,928 subscribers who requested either individual channels or the Century Select package, 2,113 are reported to have subscribed to individual channels. Based on these figures, assuming a best case scenario for Century, about 9.6 percent of subscribers to these channels elected to subscribe to individual channels. This analyzes the facts most favorably to Century because fewer than 2,113 may have subscribed to individual channels. Our test does not specify what number would indicate that an offering is "a realistic service offering." However, the fact that such a low percentage of subscribers opted for individual channels rather than the package, together with the other factors present in this case,[22] tends to show, in this instance, that the per-channel offering does not constitute a realistic service offering.

18. Even if we were to apply the 15 interpretive guidelines set forth in our *Second Reconsideration Order*,[23] we still would not reach a clear answer to the question of what constitutes a realistic service offering. Although some factors support a finding that Century's offering was not a permissible a la carte package, other factors point the other way. In particular, although a "significant percentage" of the channels offered in the a la carte package (100 percent) was removed from regulated tiers, the absolute number (six) was small.[24] Moreover, our test does not explain how the factors are to be weighed against each other. In these circumstances, we cannot say that it was clear to Century that its restructuring was not a permissible a la carte package.

19. In our recently adopted *Going Forward Order*, we have reconsidered our rules relating to a la carte packages and concluded that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act. For that reason, the package at issue is subject to rate regulation and cannot continue to be treated as an unregulated package of channels. In reaching this conclusion in the *Going Forward Order*, we acknowledged that, as applied to many fact patterns, we did not provide a clear test in the *Rate Order* and the *Second Reconsideration Order* for determining whether an a la carte package was permissible. In adopting the 15 interpretive guidelines in the *Second Reconsideration Order* to supplement the *Rate Order's* two-prong test, we hoped to enable operators to better determine what collective offerings of a la carte channels would be considered a realistic service offering.

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[18] In our *Going Forward Order*, we have reconsidered our regulatory treatment of collective offerings of a la carte channels. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking*, MM Docket Nos. 92-266 and 93-215, FCC 94-286 (adopted November 10, 1994) *("Going Forward Order")*. Specifically, we have determined that such packages are cable programming service tiers within the meaning of Section 3(l)(2) of the 1992 Cable Act and therefore will be subject to our general rate regulation rules. *Id.* at ¶46. However, in order to determine whether Century evaded rate regulation when it restructured its offering, we must evaluate its a la carte package under the rules that were in effect when it restructured.

[19] *Rate Order* ¶ 329.

[20] *See, e.g., Rate Order* ¶ 453 n.1161 ("There is no evidence that operators would or, as a business matter, could shift programming previously offered as part of a tier to 'a la carte' status, *i.e.*, a per-channel or per-program offering, to avoid the rate regulation applicable to tiers").

[21] *Id.* at ¶ ¶ 327-28 & n.808. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994) *("Second Reconsideration Order")*, the Commission affirmed its prior view. It said that "we continue to believe that the public interest will be served by generally permitting non-regulated treatment of collective offerings of 'a la carte' channels if the offering enhances consumer choice and does not constitute an evasion of rate regulation." *Id.* at ¶ 194. In this regard, we retained the two-part test contained in the *Rate Order* for determining when we would refrain from regulating "a la carte packages." In addition, the Commission set out 15 guidelines to enable operators to better determine what collective offerings of "a la carte" channels will be considered "realistic service offerings." *Id.* at ¶ 195.

[22] *See, e.g.*, ¶ ¶ 13-14, *supra*.

[23] *Second Reconsideration Order* at ¶ 196.

[24] *Id.*

and, hence, not an evasion of rate regulation.[25] Our experience to date, however, indicates that our efforts did not produce the intended result and that, instead, there has been confusion as to whether collective offerings of a la carte channels constituted an evasion of rate regulation. Indeed, we cannot say that it is clear that Century's restructuring was not a permissible a la carte package.

20. For that reason, we do not think that it would be equitable to subject Century to refund liability. This result is distinguishable from the result we reached in *Adelphia Cable Partners, L.P.*,[26] in which we determined that we will require refunds if Adelphia's rate justification proceedings show that subscribers' rates were higher than our rules permitted. In that case, the cable operator announced that it would offer all the channels previously offered on a cable programming service tier on an individual basis or as a collective offering of a la carte channels. In so doing, Adelphia removed an entire service tier from rate regulation, while here, Century eliminated two cable programming service tiers but moved most of the channels from those tiers into the rate regulated basic tier. Century attempted to treat only six channels as an unregulated collective offering of a la carte channels. Moreover, while we have indicated above that our rules for determining whether collective offerings of a la carte channels constitute an evasion were in many instances difficult to apply, we do not believe that our a la carte rules are unclear as applied to the fact pattern in the *Adelphia* case. In the *Rate Order*, we stated that a cable operator could not escape rate regulation simply by calling what otherwise would be a rate regulated tier an a la carte package.[27] We reiterated this admonition in the *Second Reconsideration Order* when we warned against eliminating "an entire regulated tier" and "turning it into an a la carte package."[28]

21. We will not require Century to restructure its tiers so as to return the channels offered in the a la carte package to the basic or cable programming service tiers.[29] Instead, on a prospective basis, we will consider Century's collective offering of a la carte channels a new product tier[30] even though it would not qualify as a new product tier under our recently announced *Going Forward Order* because one of the conditions for a new product tier is that channels may not be removed from a basic service tier or a cable programming service tier. In light of the prior confusion over what constituted a permissible a la carte offering, and because Century's four-channel tier, unlike Adelphia's offering, did not constitute a clear evasion of our rate rules, we see no good reason to subject Century or its Brunswick customers to the confusion and transaction costs that would result if we required Century to retier.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that Century's package as it existed on December 13, 1993, may be treated as a new product tier under our *Going Forward Order*.

23. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[25] *See Going Forward Order* at ¶ 40.

[26] *Adelphia Cable Partners, L.P.*, South Dade County, Florida, LOI-93-42, DA 94-1277 (released November 18, 1994).

[27] *Rate Order*, 8 FCC Rcd 5837, n.808 ("we do not think a cable operator can escape rate regulation simply by announcing that tiered services are available a la carte").

[28] *Second Reconsideration Order* ¶ 196.

[29] We are not precluding Century from treating this package as a cable programming service tier, priced pursuant to our rules, or from putting the channels back into an existing tier.

[30] *See Going Forward Order* at ¶ ¶ 16-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

U S West Communications, Inc.

Petition for Authority
To Make Permanent
Price Cap Index Reduction

ORDER

Adopted: November 21, 1994; Released: November 23, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In the captioned petition, U S West Communications, Inc. (U S West) seeks authority to make a permanent reduction in its price cap indices (PCI).[1] U S West intends to reduce its PCI by $13 million in order to "compensate" customers who allege that U S West's earnings reported in 1989 and 1990 were excessive.[2] Several parties have filed oppositions to, or comments regarding, U S West's petition.[3] For the reasons discussed below, we grant the petition, subject to conditions discussed in this Order.

II. BACKGROUND

2. The complaints of overearnings underlying the captioned petition stem from events that occurred under rate-of-return regulation and prior to January 1, 1991, when we introduced the Commission's price cap system of regulation for local exchange carriers (LECs). Rate-of-return regulation required LECs to file rates calculated to yield 12 percent earnings for overall interstate access for the period from January 1, 1989 through December 31, 1990.[4] If a LEC's overall interstate earnings exceeded a 12.25 percent "buffer," or its rate of return for any given access category was greater than 12.40 percent, it was considered to have violated the Commission's rate prescription.[5] U S West's reported rate of return for the two-year period from January 1, 1989 through December 31, 1990 was 12.75 percent on a total interstate average rate base of $3.7 billion.[6]

3. Several parties, including those opposing the instant petition, filed Section 208 complaints[7] against U S West that allege that its 1989 and 1990 rates were unreasonable, and thus violate Sections 4(i), 201(b) and 205(a) of the Act,[8] because its earnings for those periods exceeded the Commission-prescribed rate of return.[9] Under Section 209 of the Act, the Commission is authorized to order a carrier

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[1] *See* Public Notice, DA 93-1377 (released Nov. 15, 1993). The PCI limits the prices that price cap Local Exchange Carriers (LECs) may charge for interstate services. The formula for setting a LEC's PCI contains three main elements -- an inflation factor, a productivity offset, and exogenous costs. The inflation factor is based on the Gross National Product Price Index (GNP-PI). The productivity offset, which is subtracted from the inflation factor, reflects the amount by which LEC productivity has historically exceeded productivity in the economy as a whole. The resulting figure is also adjusted for exogenous costs, which are defined as those costs caused by administrative, legislative, or judicial actions beyond the LEC's control and not otherwise reflected in the price cap calculations. *See* Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order*), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*).

[2] U S West Petition at 1.

[3] Allnet Communication Services, Inc. (Allnet), Competitive Telecommunications Association (Comptel), and WilTel, Inc. (WilTel), filed oppositions to U S West's petition. Pacific Bell and Nevada Bell (Pacific-Nevada) filed comments concerning the petition. WilTel entered into a settlement with U S West subsequent to the filing of its opposition. *See* note 17 *infra*. LiTel Telecommunications Corporation d/b/a LCI International (LiTel) submitted a motion for leave to file comments. This motion incorporates by reference an opposition LiTel filed against a petition for reconsideration that U S West submitted in a related proceeding. *See* LiTel Telecommunications Corporation d/b/a LCI International v. U S West Communications, Inc., Cincinnati Bell Telephone Company, and New York Telephone Company, Memorandum Opinion and Order, 9 FCC Rcd 1619 (1994), *recon. pending* (*LiTel Order*). U S West opposes LiTel's motion on the grounds that it should be addressed in the reconsideration proceeding and is "more than a little superfluous." U S West Opposition to LiTel Motion for Leave to File Comments, at 1-2. Nevertheless, we grant LiTel's motion because its comments address the issue of U S West's proposed PCI reduction and are therefore relevant to this proceeding.

[4] *See, e.g.*, American Tel. & Tel. Co. v. Central Tel. Co. - Iowa, *et al.*, 8 FCC Rcd 3546, 3547-58 (1993) (*AT&T Damages Order*), *vacated and terminated as moot only with respect to claims against U S West*, 8 FCC Rcd 3545 (1993) (*AT&T Settlement Order*).

[5] *Id.*

[6] *See* U S West Petition at 2; *LiTel Order*, 9 FCC Rcd at 1628, Appendix A.

[7] 47 U.S.C. § 208 provides, in pertinent part, that:

> Any person . . . complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparations for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant . . . .

[8] 47 U.S.C. §§ 4(i), 201(b), 205(a).

[9] The following parties filed notices of formal complaint, as indicated by file number: Access Long Distance, File No. E-93-153; Allnet Communications Services, Inc. (Allnet), File No. E-93-026; American Tel. & Tel. Co. (AT&T), File No. E-92-14; American Sharecom, Inc., File No. E-93-150; Cable and Wireless, Inc. (Cable & Wireless), LDDS Communications, Inc., d/b/a LDDS Metromedia Communications, One to One Communications, Inc., Pacnet, Inc., Teleconcepts, Inc., d/b/a Telephone Ex-

to pay monetary damages to a complainant who has successfully proven its entitlement. The Commission may also specify a date for such payment.[10]

4. In the *LiTel Order*, the Commission granted LiTel's complaint " and awarded it monetary damages of $54,311 plus interest, after finding that LiTel had incurred actual damages as a result of U S West's overearnings.[11] U S West has filed a petition for reconsideration of the *LiTel Order*, contending that its captioned proposal to reduce its PCI permanently will fully reimburse LiTel for any damages due to overearnings.[12] In a subsequent Order, the Commission awarded Allnet $358,000 in monetary damages plus interest, after finding U S West liable for the same overearnings.[13] U S West has also sought reconsideration of the *Allnet Order* on the grounds that the proposed PCI reduction will fully reimburse Allnet.[14]

5. Some parties have settled their complaints with U S West. The Commission awarded $39.3 million plus interest in damages to AT&T in the *AT&T Damages Order* for injuries arising out of U S West's overearnings.[15] It later dismissed AT&T's complaint pursuant to a motion to dismiss that AT&T and U S West filed jointly as part of a settlement prior to the release of the *AT&T Damages Order*.[16] When U S West entered into additional settlements with Access Long Distance, American Sharecom, MCI, Midco, Sprint, Tel-America and WilTel, the Common Carrier Bureau's Enforcement Division dismissed those complaints also.[17] The complaints filed by Cable & Wireless, *et al.*, and Call-America and U S West's petitions for reconsideration of the *Allnet Order* and *LiTel Order*, however, remain pending.

III. DISCUSSION

6. U S West raises two issues, which we discuss separately below: (1) whether we should waive the price cap rules to allow U S West to make a permanent reduction to its PCI as a means of settling certain overearnings claims relating to pre-price cap rates; and (2) if so, whether the PCI reduction qualifies as an "industry-wide" settlement, as U S West maintains, that "cuts off" all claims by non-settling complainants.

A. Waiver of Price Cap Rules To Make A Permanent PCI Reduction

7. *Background.* Section 61.45 of the Commission's rules, 47 C.F.R. § 61.45, codifies the formula for making adjustments to the PCI and lists the conditions under which such adjustments may be made. Because the types of PCI adjustments authorized by Section 61.45 do not include a PCI reduction to meet overearnings obligations arising out of Section 208 complaints, U S West requires a waiver of Section 61.45. Waiver of a Commission rule may be granted for good cause shown.[18] The Court of Appeals has held that waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will better serve the public interest than adherence to the general rule.[19]

8. *Pleadings.* U S West asserts that the $13 million PCI reduction is part of the settlement agreements it entered into with Access Long Distance, American Sharecom, AT&T, MCI, Midco, and Sprint.[20] U S West states that it plans to use the PCI reduction as a defense against pending overearnings complaints because it will "formalize the fact that the price reduction it represents is . . . a response to" its overearnings liabilities.[21] U S West also contends that the PCI reduction will enable it to reduce prices without violating the pricing limitations in the price cap rules.[22] Although U S West does not specify what pricing violations would occur absent a PCI reduction, presumably it means that lowering the PCI would trigger a comparable adjustment to its service band indexes (SBIs), thereby lowering the floor of its SBIs so that rate reductions could be implemented without putting undue pressure on, or falling below, the SBI floor in violation of Section 61.47 of the rules.

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press, File No. E-93-123; KLP, Inc., d/b/a Call-America (Call-America), File No. E-93-151; LiTel, File No. E-92-119; MCI Telecommunications Corp. (MCI), Western Union Int'l., Inc., and Telecom*USA, Inc., File No. E-93-102; Midco Communications, Inc. (Midco), File No. E-93-152; Sprint Communications Co., L.P. (Sprint), File No. E-92-108; Tel-America of Salt Lake City, Inc. (Tel-America), File No. E-93-162; WilTel, Inc. (WilTel), File No. E-93-131.

[10] 47 U.S.C. § 209 provides that:

> If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

[11] *LiTel Order*, 9 FCC Rcd at 1626, 1631-32.

[12] *See* note 3 *supra*.

[13] ACC Long Distance Corp. v. New York Tel. Co. and Allnet Communication Services, Inc. v. The BellSouth Telephone Companies, *et al.*, 9 FCC Rcd 1659 (1994), *recon. pending* (*Allnet Order*).

[14] *Id.*

[15] *AT&T Damages Order*, 8 FCC Rcd at 3554-55.

[16] *AT&T Settlement Order*, 8 FCC Rcd 3545.

[17] *See* Access Long Distance v. U S West Communications, Inc., 8 FCC Rcd 8384 (Enforcement Div. 1993); American Sharecom, Inc. v. U S West Communications, inc., 8 FCC Rcd 7680 (Enforcement Div. 1993); Midco Communications, Inc. v. U S West Communications, Inc., 8 FCC Rcd 8427 (Enforcement Div. 1993); MCI Telecommunications Corp., Western Union International, Inc., and Telecom*USA, Inc. v. U S West Communications, Inc., 8 FCC Rcd 7574 (Enforcement Div. 1993); Tel-America of Salt Lake City, Inc. v. U S West Communications, Inc., 9 FCC Rcd 1269 (1994); Sprint Communications Co., L.P. v. U S West Communications, Inc., 8 FCC Rcd 7285 (Enforcement Div. 1993); WilTel, Inc. v. U S West Communications, Inc., DA 94-1044 (Enforcement Div., released Sept. 29, 1994).

[18] *See* Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3.

[19] Northeast Cellular Tel. Co., L.P., v. F.C.C., 897 F.2d 1164, 1166 (D.C. Cir. 1990), *citing* WAIT Radio v. F.C.C., 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). *See, e.g.*, Petition for Waiver of the Commission's Rules To Recover Network Depreciation Costs, 9 FCC Rcd 377, 388 (1993).

[20] U S West Petition at 5.

[21] *Id.* at 1, 5.

[22] *Id.* at n.12, *citing* Sections 61.46 and 61.47 of the Commission's rules, 47 C.F.R. §§ 61.46, 61.47.

9. Allnet, Comptel and LiTel assert that a PCI reduction will not reimburse them adequately for their past overpayments to U S West. According to these parties, the PCI reduction would not necessarily lead to reduced prices since U S West currently prices below its PCI.[23] Several parties express concern that a PCI reduction would not guarantee them the "full amount of damages" to which they are entitled under Section 206 of the Act.[24] Comptel explains that U S West would deprive complainants of their rights to receive "reparations [that] take the form of cash payments" by offering instead only "prospective rate reductions."[25]

10. Although Pacific-Nevada does not object to a grant of U S West's petition *per se*, it opposes a general rule allowing damages or settlements to be in the form of price cap adjustments because this would contradict the Commission's decision in establishing the price cap system to distinguish between Section 208 damages and refunds.[26] U S West replies that, although there may not be an exact correlation between a PCI reduction and reduced prices, its proposal will make "significant price reductions available to the entire industry."[27]

11. *Discussion*. We conclude that we should grant U S West a waiver of Section 61.45 and permit it to make a permanent reduction to its PCI, subject to certain conditions, however, as discussed in Section III.B *infra*. Although Section 61.45 does not provide for PCI adjustments of the type that U S West requests, the Commission has permitted a LEC to make a permanent downward adjustment to its PCI as a term of a consent decree to reflect a finding in a Commission audit that the LEC's non-regulated affiliates had earned substantially in excess of the rate-of-return prescribed by the Commission.[28] Similarly, Access Long Distance, American Sharecom, AT&T, MCI, Midco, Tel-America, Sprint, and WilTel have consented, as part of their settlement agreements, to allow U S West to make a permanent PCI reduction in lieu of having their Section 208 overearnings complaints, and any potential rights to damages, adjudicated.[29] None of the parties to the settlements, except WilTel,[30] formally opposed the proposed PCI reduction. Because the Commission considers it in the public interest to allow settlement of disputes to reduce litigation expenses incurred by the parties and burdens on Commission resources,[31] the terms of privately negotiated settlements adopted by the Commission are, by extension, also in the public interest. Approval of the PCI reduction proposed by U S West as part of the settlement agreements, although not contemplated by Section 61.45 of the rules, would thus serve the purposes of reducing litigation costs to the parties and burdens on Commission resources. We therefore conclude that it is in the public interest to grant U S West a waiver of Section 61.45 of the rules to allow it to file a permanent PCI reduction.

12. Our decision to grant U S West a waiver to permit the permanent PCI reduction does not prejudice our authority in the tariff review process to review and, if necessary, reject or investigate any transmittals that U S West may file in implementing a permanent PCI reduction. Nor does our grant of a waiver constitute approval of the method by which U S West proposes to "allocate" a PCI reduction.[32] Any such decision would not be reached unless and until U S West makes tariff filings with appropriate support information.[33] Furthermore, because the PCI reduction would reflect the settlements of complaints concerning U S West's pre-price cap overearnings for the period from January 1, 1989 through December 31, 1990, U S West should account for any effects of the PCI reduction as later adjustments to its FCC Form 492 earnings reports filed with the Commission for those same periods. U S West should not include any of the PCI reduction's effects in its earnings calculations to determine its sharing obligation for its current reporting period for price cap purposes. This method is consistent with the Commission's requirement under rate of return regulation that LECs treat overearnings payments, whether they be direct payments to customers, rate reductions in subsequent tariff-filing periods, or damages awarded after complaints, as adjustments to the period in which the overearnings occurred, rather than to the period in which the payment is made.[34]

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[23] Allnet Opposition at 2-3; Comptel Opposition at 2; LiTel Opposition at 3.

[24] Comptel Opposition at 2; LiTel Opposition at 4; WilTel Opposition at 4.

[25] Comptel Opposition at 2, 4.

[26] Pacific-Nevada Comments at nn.2-3, *citing LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2692, 2734.

[27] U S West Petition at 3 n.6.

[28] *See, e.g.*, The GTE Telephone Operating Companies, Memorandum Opinion and Order, AAD 94-36, 9 FCC Rcd 2588 (1994) (*GTOC Order*); The GTE Telephone Operating Companies, Consent Decree Order, AAD 94-35, 9 FCC Rcd 2594, 2595 (1994) (*GTOC Consent Decree*) (stipulating that GTOC make a permanent downward adjustment of $14 million to its PCI for the common line basket, effective April 15, 1994, in order to reflect overearnings of GTOC's non-regulated affiliates).

[29] U S West Petition at 4-5.

[30] Although WilTel filed an opposition in the instant proceeding, its concerns are presumably substantially addressed by the settlement it subsequently reached with U S West. *See* note 17 *supra*.

[31] *See* discussion at note 35 *infra*.

[32] U S West proposes to allocate a $13 million permanent PCI reduction to the common line, traffic sensitive and special access baskets based on the 1992 revenues associated with these baskets as reflected in the price cap formula by the "R" factor. "R" represents the percentage change in basket revenues from a base period to the time the PCI is updated. We note, without deciding, that U S West's proposed use of "R" to allocate its PCI adjustment is consistent with the manner in which price cap LECs have been required to make allocations of their sharing obligations to baskets in their annual access tariffs. U S West asserts that the $13 million reduction would be allocated per basket based on "R" as follows: (i) in common line, $5.3 million; (ii) in traffic sensitive, $6.36 million; and (iii) in special access, $1.3 million. U S West Petition at 4.

[33] We note that the ordinary tariff review procedures would apply to any tariff filings U S West chooses to make in implementing a PCI reduction. *See* Section 1.733 of the Commission's rules, 47 C.F.R. § 1.773.

[34] *See, e.g.*, Amendment of Part 65, Interstate Rate of Return Prescription: Procedures and Methodologies To Establish Reporting Requirements, 1 FCC Rcd 952, 956-57 (1986); Section 65.600 of the Commission's rules, 47 C.F.R. § 65.600.

B. Effect of PCI Reduction on Non-Settling and Future Complainants

13. *Background.* In granting joint motions to dismiss the complaints against U S West filed by Access Long Distance, American Sharecom, AT&T, MCI, Midco, Sprint, Tel-America and WilTel, the Enforcement Division found that dismissal pursuant to the parties' individual settlement agreements would serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and the Commission.[35] In dismissing AT&T's complaint pursuant to its settlement, the Commission found that such action would not adversely affect the interests of any other party.[36]

14. *Pleadings.* U S West contends that it would not be discriminatory to enforce a PCI reduction as satisfaction of all overearnings claims because the Commission has "precisely the power to cut off [c]omplainants' rights based on industry[-wide] settlements," citing *New York State Dept. of Law v. F.C.C* as support for its argument.[37] U S West believes that a PCI reduction is "a superior vehicle" for ensuring that all of its customers receive the maximum price reductions.[38] U S West further asserts that use of a PCI reduction will better effectuate settlement of all the Section 208 overearnings complaints against it than a "simple price reduction."[39] U S West states that, although it would "set forth the [PCI reduction] in defense of any damages," it does not require an Order resolving any disputes raised by non-settling parties regarding the impact of the PCI reduction.[40] U S West concludes that those parties with pending Section 208 complaints should not be allowed to "deprive the public of the benefits of [a] PCI reduction" while they prosecute their individual causes of action.[41]

15. In opposition, several parties contend that allowing U S West to enforce the proposed PCI reduction against them as a defense to any pending or future overearnings claims is unreasonably discriminatory because they were not parties to the settlement agreements between U S West and Access Long Distance, American Sharecom, AT&T, MCI, Midco, or Sprint.[42] LiTel argues that it should not be forced to enter into a settlement for prospective relief when the Commission has already directed U S West presently to pay damages plus interest.[43] WilTel asserts that U S West's proposal would push non-settling complainants into a unilateral settlement agreement containing a formula of damages that does not reflect the full amount of their actual damages.[44]

16. *Discussion.* Although we are permitting U S West to implement a permanent PCI reduction, we reject its implied conclusion that this would "cut off" the rights of third-parties. The *New York State* decision U S West cites as support for its contention that the Commission may cut off the rights of third parties by means of an industry-wide settlement actually stands for the opposite proposition.[45] *New York State* involved a Commission Order to show cause finding that the NYNEX Telephone Companies (NYNEX) violated the Commission's affiliate transaction rules.[46] In a subsequent consent decree the Commission promised not to institute any proceedings against NYNEX with respect to affiliate transaction violations. In exchange, NYNEX agreed without admitting wrongdoing to certain conditions, including a voluntary one-time reduction in its interstate revenue requirement of $35.5 million and a voluntary contribution to the United States Treasury of $1.4 million.[47]

17. In explaining its reasons for approving the consent decree in the *NYNEX Consent Decree Reconsideration Order*, the Commission expressly stated that the decree did:

> not impair a person's statutory right to seek relief against a carrier and have a claim adjudicated under Section 208. Resolving our enforcement proceedings against [NYNEX] through the consent decree did not abridge the rights of third persons concerning pending or future Section 208 complaints . . . .[48]

In the *New York State* decision, the Court of Appeals cited this language favorably to conclude that the decree was reasonable because the Commission did *not* foreclose any third-party complaints or otherwise limit its duty to respond to pending or future Section 208 complaints.[49] Similarly, the Commission has a statutory obligation to respond to the pending complaints. We therefore conclude that any PCI reduction U S West may implement does not "cut off" the rights of complainants to seek relief against U S West and have their claims adjudicated.

18. We also find that any PCI reduction U S West may implement would not constitute an "industry-wide" settlement. The Commission 1initiated the investigation underlying the *New York State* decision and subsequently entered into the consent decree with NYNEX because the decree guaranteed certainty of relief to consumers and obtained the same relief as would have been obtained were the Commission to have adopted a final Order.[50] Specifically, the Commission stated in the *NYNEX Consent Decree Reconsideration Order* that the "requirements of the consent decree matched dollar-for-dollar the proposed reme-

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[35] *See* note 17 *supra*.
[36] *See* note 4 *supra*.
[37] U S West Reply at n.5, *citing* New York State Dept. of Law v. F.C.C., 984 F.2d 1209, 1219-20 (D.C. Cir. 1993) (*New York State*).
[38] U S West Petition at 5.
[39] *Id.* at 5-6.
[40] *Id.* at 1; U S West Reply at 2.
[41] *Id.* at 2-3.
[42] Allnet Opposition at 2; Comptel Opposition at 4-5; LiTel Opposition at 4; WilTel Opposition at 2.
[43] LiTel Opposition at 4.
[44] WilTel Opposition at 3-4. At the time that WilTel filed its opposition, it had not yet entered into a settlement agreement with U S West. *See* note 17 *supra*.
[45] U S West Reply at 2 n.5.
[46] *New York State*, 984 F.2d at 1211.
[47] *Id.* at 1212; *see also* New York Tel. Co. & New England Tel. & Tel. Co., 5 FCC Rcd 5892 (1990) (*NYNEX Consent Decree*), *affirmed on recon.*, 6 FCC Rcd 3303 (*NYNEX Consent Decree Reconsideration Order*).
[48] *NYNEX Consent Decree Reconsideration Order*, 6 FCC Rcd at 3306.
[49] *New York State*, 984 F.2d at 1219-20.
[50] *NYNEX Consent Decree Reconsideration Order*, 6 FCC Rcd at 3304-05.

dies outlined in the *Order to Show Cause*.[51] In contrast, the Commission did not initiate the instant complaint proceedings and was not a party to the settlements that U S West individually negotiated. Furthermore, in dismissing the complaints of the settling parties, the Enforcement Division did not rule that the settlements would guarantee certainty of relief for other consumers.[52] Nor did the Enforcement Division find that the settlements those parties reached with U S West would yield the same amount of relief as would have been obtained by final Orders.[53] We therefore conclude that U S West cannot properly characterize any PCI reduction it may implement as an "industry-wide" settlement. Accordingly, we conclude that U S West cannot set forth a PCI reduction as a defense to any current or future overearnings liability.[54] We further conclude that any PCI reduction U S West may implement would not compensate any complainants who have not settled with U S West.[55]

IV. CONCLUSION AND ORDERING CLAUSE

19. For the foregoing reasons, we find that U S West has shown that it should be granted a waiver of Section 61.45(d) of the Commission's rules in order to implement a permanent reduction to its initial PCI for the 1991 tariff year. Our decision is permissive in nature and any PCI reduction U S West chooses to make by a tariff filing is subject to our tariff review process. Further, in keeping with the conditions set forth in Section III.B *supra*, our decision to grant U S West a waiver to make a PCI reduction is without prejudice to pending or future complaint proceedings against U S West concerning the overearnings at issue.

20. Accordingly, IT IS ORDERED THAT the Petition for Authority To Make a Permanent Price Cap Index Reduction filed by U S West Communications, Inc., IS GRANTED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[51] *Id.*

[52] *See* note 17 *supra*.

[53] *Id.*

[54] For example, Allnet and LiTel have already obtained judgments of liability and damage awards against U S West. In the *Allnet Order* and *LiTel Order*, the Commission has ordered U S West to pay the complainants "within 60 days after release" of the orders. The Commission has also awarded pre-judgment interest to Allnet and LiTel and scheduled the interest payments to be compounded daily at rates equal to the Internal Revenue Service (IRS) rates for tax overpayments for the same period. On this basis, interest began to accrue on January 1, 1991, which is the day after the 1989-1990 monitoring period ended, and continues to accrue until the date of full payment to the complainants. *Allnet Order*, 9 FCC Rcd at 1665-68, Appendix D; *LiTel Order*, 9 FCC Rcd at 1625-26, Appendix C.

[55] *See* note 17 *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Service Corporation

Petition for Extension of
Waiver of Requirements
Governing Alternate Technologies
for Equal Access

ORDER

Adopted: December 16, 1994; Released: December 16, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 30, 1994, GTE Service Corporation (GTE) requested an extension of a waiver of the *Alternate Technologies Order* we granted in 1993.[1] The *Alternate Technologies Order* required GTE's predecessor, Contel Service Corporation (Contel), to charge less-than-premium rates for interstate switched access service provided through alternate equal access technology after December 31, 1992.[2] Our 1993 waiver of the *Alternate Technologies Order* allowed GTE to charge premium access rates at 36 central offices in Indiana and Iowa, although GTE continued to provide switched access service through alternate equal access technology at those central offices.[3] GTE now seeks an extension of its waiver until the end of 1997 for ten of its Iowa switches, and until the end of 1998 for nine of its Indiana switches. For the reasons discussed below, we conclude that it is not reasonable for GTE to continue to charge premium rates for less-than-premium switched access service for a prolonged period of time. Accordingly, we deny GTE's request for a multi-year extension of the waiver. We, however, will permit GTE to continue to charge its current rates for switched access service in the central offices that are the subject of this waiver request for an additional month in order to allow adequate time for the Commission and interested parties to review GTE's proposed new rates.

II. BACKGROUND

2. GTE is required, upon bona fide request, to provide to all interexchange carriers (IXCs) exchange access that is equal in type and quality to that provided to American Telephone and Telegraph Company (AT&T). This equal access requirement was imposed by the court as a result of its acquisition of Southern Pacific Communications Company (SPCC) and Southern Pacific Satellite Company.[4] This requirement was patterned on the equal access obligations placed on the Bell Operating Companies (BOCs) under the *Modification of Final Judgment* (MFJ).[5] Most local exchange carriers (LECs) -- BOCs as well as independents[6] -- comply with this requirement by replacing step-by-step or electromechanical switches, which cannot provide equal access, with electronic switches. Some LECs, however, sought to implement equal access in certain step-by-step and electromechanical central offices, or at access tandems, by using "adjunct" or "alternate" technologies instead of electronic switches.[7]

3. The Commission found in the past that the use of alternate technologies to provide equal access was not unreasonable in light of the *MFJ* Court's requirement to provide equal access by March 1, 1988.[8] The Commission also determined, however, that alternate technologies produce more post-dial delay[9] than electronic switches,[10] and that some basic and enhanced services, such as open network architecture (ONA) services and signalling system 7 (SS7) services,[11] would not be available at an electromechanical switch using alternate technologies.[12] The Com-

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[1] GTE Service Corporation, Use of Alternate Technologies for Equal Access, 8 FCC Rcd 4438 (Com. Car. Bur. 1993) (*GTE Order*).

[2] Contel Service Corporation, *et al.*, MM (*sic*) Docket No. 88-287, 6 FCC Rcd 3760, 3761 (1991) (*Alternate Technologies Order*). For ease of reference, we refer in this Order to equal access provided by means of alternate technologies as "equal access-equivalent service" or "less-than-premium switched access service."

[3] *GTE Order*, 8 FCC Rcd at 4438 (para. 1).

[4] United States v. GTE Corporation, 603 F. Supp. 730, 744 (D.D.C. 1984).

[5] United States v. American Telephone and Telegraph Co., 552 F. Supp. 131, 232-33 (D.D.C. 1982) (*Modification of Final Judgment* or *MFJ*). In particular, the Court required the BOCs to provide access service that would enable subscribers to reach their interexchange carrier of choice without dialing additional digits, or in other words, "1+ dialing." *Id.* at 233.

[6] The equal access obligations of independent telephone companies other than GTE were established in MTS and WATS Market Structure, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985), *recon. denied* FCC 86-4, 59 Rad. Reg. 2d 1410 (released Jan. 4, 1986).

[7] For example, in 1987, US West introduced the LATA Equal Access System (LEAS) and System Central Office Network Access (System CONTAC), which are software and hardware modifications, respectively, to electromechanical switches. *See* Alternative Equal Access Arrangements, 3 FCC Rcd 5085 (Com. Car. Bur. 1987); *see also Alternate Technologies Order*, 6 FCC Rcd at 3760 n.1.

[8] *Alternate Technologies Order*, 6 FCC Rcd at 3770 (para. 89).

[9] "Post-dial delay" is the time it takes to get a ringing tone or busy signal after the caller has dialed the last digit.

[10] *Alternate Technologies Order*, 6 FCC Rcd at 3770 (paras. 90-91).

[11] Common channel signalling (CCS), common channel signalling 7 (CCS7), and SS7 are terms sometimes used interchangeably to refer to CCS-based services and capabilities that use SS7. With common channel signalling, call set-up instructions are separated from the call and carried over a packet switching network independent of the circuits that carry the calls themselves. This form of "out-of-band" signalling is more efficient because the voice path is not occupied until the call is ready to be transmitted. The SS7 network makes several other services possible, such as line information database (LIDB) calling card validation and 800 database service, which enables 800 service subscribers to change long distance carriers without changing their 800 number. Currently, for CCS services, the LECs use the SS7 protocol, which is the newest generation of switching software that defines the procedures for call set-up and formatting.

[12] *Alternate Technologies Order*, 6 FCC Rcd at 3772 (para. 108).

mission concluded, therefore, that use of alternate technologies would not be an adequate permanent solution for providing equal access. As a result, it established a transition period of approximately 18 months, ending on December 31, 1992, during which LECs were to replace alternate technologies with electronic switches.[13] LECs could elect to continue to use alternate technologies after December 31, 1992, so long as they charged less-than-premium rates for equal access-equivalent service provided through these technologies.[14]

4. On December 18, 1992, GTE requested a waiver of the *Alternate Technologies Order* to allow it to continue to charge premium rates for equal access-equivalent service provided through alternate technologies at 36 central offices in Iowa and Indiana after expiration of the transition period.[15] Specifically, GTE sought a waiver for 16 central offices in Iowa until December 31, 1994, for an additional ten Iowa central offices until December 31, 1997, and for 10 central offices in Indiana until 2001.[16] In June 1993, the Common Carrier Bureau (Bureau) found that GTE had shown good cause for waiver of the *Alternate Technologies Order* for 16 Iowa central offices until December 31, 1994, but had not justified its waiver request for the 20 central offices scheduled to be converted to full equal access after that date. Accordingly, the Bureau permitted GTE to charge premium rates for equal access-equivalent service provided through alternate technologies at the 36 designated central offices until December 31, 1994.[17] GTE now seeks extension of that waiver for 19 central offices located in Iowa and Indiana. On July 11, 1994, MCI Telecommunications Corporation (MCI) filed an opposition to GTE's waiver petition, and GTE submitted a reply on September 13, 1994.

III. PLEADINGS

5. GTE states that it has replaced the switches in three of the 36 central offices for which it was granted waiver in 1992, and that it plans to upgrade the switches in another 14 central offices by the end of 1994.[18] GTE reports that ten of the remaining 19 central offices are in Iowa, and nine are in Indiana. GTE also asserts that the central offices in Iowa each serve 600 or fewer lines, while the central offices in Indiana each serve 2000 or fewer lines.[19] GTE plans to replace the switches in the ten Iowa central offices by the end of 1997, and the switches in its nine Indiana central offices by the end of 1998, although it states that its plans for its Indiana switches are subject to change.[20] GTE further alleges that the cost of replacing these switches is approximately $8 million.[21] GTE acknowledges that alternate technologies can cause longer post-dial delay, but alleges that it is unaware of any customer problems attributable to the post-dial delay associated with the alternate technologies.[22] Finally, if the Bureau denies its request for extension of the current waivers, GTE contends, based on the absence of any evidence of customer dissatisfaction, that its rates for equal access-equivalent service should be 10 percent lower than its current premium rates.[23]

6. MCI opposes GTE's waiver request on the grounds that its asserted justification is no more persuasive than the showing the Bureau rejected in 1993 when it refused to permit GTE to charge premium rates for less-than-premium switched access service provided in these central offices after December 31, 1994.[24] MCI also contends that GTE's proposal to delay introduction of full equal access in the 19 central offices is inconsistent with GTE's support of national information infrastructure development in its price cap performance review comments.[25] MCI further argues that GTE's waiver petition should be denied because allowing GTE to charge premium access rates for less-than-premium access service gives GTE no incentive to upgrade its switches.[26] Finally, MCI opposes GTE's proposal to reduce its charges by 10 percent in the event its waiver request is denied. MCI contends that the less-than-premium rates should be equal to 45 percent of premium rates, *i.e.*, equal to non-premium rates.[27]

7. GTE replies that its central offices that are equipped with alternate technologies do provide the "paramount features" of equal access: the ability of consumers to choose an interexchange carrier and to obtain access to their presubscribed interexchange carrier by dialing 1+.[28] GTE also claims that the post-dial delay caused by its alternate technologies is "minimal," and reiterates that it is unaware of any customer dissatisfaction with service provided with alternate technologies.[29] GTE argues that there is no jus-

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[13] *Id.* at 3780 (paras. 198-99).

[14] *Id.* at 3780 (para. 201). Under Section 69.113 of the Commission's rules, 47 C.F.R. § 69.113, "non-premium" access is considered to be access not deemed to be "premium" access as defined by Section 69.105(b)(1) of the rules, 47 C.F.R. § 69.105(b)(1). "Premium" access is basically access equivalent to that available to AT&T at that switch. LECs assess premium access charges for switched access services offered in electronic stored program control offices and for Feature Group C switched access service provided in other offices. Section 69.113 requires a carrier to set its non-premium access rates at 45 percent of its premium access rates. LECs assess non-premium access charges for Feature Group A and Feature Group B switched access services offered in offices that have not been converted to allow consumers to obtain access to an interexchange carrier other than AT&T by dialing "1+." The *Alternate Technologies Order*, 6 FCC Rcd at 3780 (para. 200), held that equal access provided through alternate technologies was superior to non-premium access, but concluded that such access service warranted "less-than-premium" access rates.

[15] GTE 1992 Petition at 2.

[16] *Id.* at 3-4.

[17] *GTE Order*, 8 FCC Rcd at 4439-40 (paras. 11-12).

[18] GTE 1994 Petition at 2.

[19] *Id.*

[20] *Id.*

[21] *Id. See GTE Order*, 8 FCC Rcd at 4439 (paras. 6-7) ($2,892,000 of its estimate is for the Iowa offices, while $5 million is for the Indiana offices).

[22] GTE Petition at 3.

[23] *Id.* at 3-4.

[24] MCI Opposition at 2-4. MCI assumes that the 19 central offices at issue here are a subset of the 20 central offices for which GTE was denied waiver in the *GTE Order*. *Id.* at 2-3.

[25] *Id.* at 4-6, *citing* GTE Comments in Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, filed May 9, 1994, at 1.

[26] MCI Opposition at 6.

[27] *Id.* at 7.

[28] GTE Reply at 1-2.

[29] *Id.* at 2.

tification for reducing its switched access rates to non-premium rate levels, as MCI recommends. GTE asserts that its rates for equal access-equivalent service, if adjusted at all, should be less-than-premium rates and greater than non-premium rates, and again proposes a discount of 10 percent from premium rate levels. GTE claims that no adjustment should be made to its carrier common line (CCL) rates or its information surcharge.[30]

IV. DISCUSSION

8. The Commission may exercise its discretion to waive a rule where there is "good cause" to do so,[31] because the particular facts would make strict compliance inconsistent with the public interest.[32] Further, the Commission's grant of a waiver must be based on articulated, reasonable standards that are predictable, workable, and not susceptible to discriminatory application.[33]

9. The *Alternate Technologies Order* stated that to obtain a waiver of the general rule set forth in that Order, a carrier must show that conversion to full equal access would "clearly be uneconomical."[34] This standard, however, applies only to instances in which the carrier decides not to convert a central office to equal access. It does not apply to this instance, in which GTE has committed to converting the 19 central offices, but proposes to delay conversion for a specified period of time. Thus, the general waiver standard set forth in *WAIT Radio v. FCC* governs GTE's request.[35] We conclude that GTE has not demonstrated good cause for extending the waiver of the *Alternate Technologies Order* we granted in the *GTE Order*.

10. In the *GTE Order*, we denied GTE's request to charge premium rates after December 31, 1994, because GTE had not demonstrated that it was "clearly uneconomical or otherwise infeasible" to convert the designated central offices before 1995.[36] GTE has not made a substantially different showing in the instant waiver petition. In particular, GTE has not made a "convincing, particularized showing that installation of electronic switches in any of these central offices would not be feasible by December 31, 1994," as was required by the *GTE Order*.[37]

11. GTE maintains that it should be permitted to charge premium access rates at these central offices because it provides to consumers the "paramount features" of equal access: the ability to obtain access to the consumer's preferred interexchange carrier through 1+ dialing.[38] We conclude that providing only 1+ access to a pre-selected interexchange carrier is not enough to justify the continued assessment of premium access rates after GTE has been given more than three years to convert these offices to full equal access. Switches using alternate technologies cannot provide certain basic and enhanced services, such as ONA and SS7 services.[39] Because of these disadvantages, the Commission found that using alternate technologies would not be an adequate permanent solution for providing equal access.[40] The record before us does not support a conclusion that it is reasonable to continue to charge premium access rates in central offices where consumers are not able to obtain the services normally available at equal access offices. Similarly, we disagree with GTE that premium access rates are warranted at these 19 central offices merely because it is unaware of any complaints regarding post-dial delay. It is undisputed that electromechanical switches equipped with alternate technologies produce greater post-dial delay than electronic switches.[41] Lack of customer complaints about post-dial delay simply may mean that customers have lowered their expectations about that aspect of service quality; it does not obviate the fact that such delay occurs with alternate technologies. We find no basis in this record that would justify allowing GTE to continue to charge the higher switched access rates that would apply if the offices offered Feature Group D service.[42]

12. GTE states that it is "not economically justified" to accelerate its schedule for replacing its electromechanical switches with electronic switches.[43] This Order does not require GTE to accelerate that schedule, nor do we interpret the *Alternate Technology Order* to require GTE to accelerate its switch replacement schedule. Rather, the latter Order requires carriers providing equal access through alternative technology after December 31, 1992, to charge less-than-premium access rates.[44]

13. The *Alternate Technology Order* requires GTE, in the absence of a waiver, to charge less-than-premium access rates for the 19 central offices at issue in this order.[45] The Order did recognize, however, that equal access provided through alternate technology was superior to non-premium access service.[46] Thus, GTE may be able to justify charging more than "non-premium" rates, which the Commission's rules define as 45 percent of its premium access rates.[47] We do not decide at this time whether the 10 percent discount proposed by GTE for less-than-premium rates is reasonable, nor do we determine what would constitute reasonable less-than-premium rates. We will consider these issues in reviewing GTE's tariff filing.

14. We will not permit GTE to exempt its CCL rates or its information surcharge from the less-than-premium rate adjustment, as it suggests in its reply. We found above that providing 1+ access to a pre-selected interexchange carrier

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30 *Id.* at 2-3.
31 *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.
32 WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).
33 Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).
34 *Alternate Technologies Order*, 6 FCC Rcd at 3780 (para. 202).
35 *See GTE Order*, 8 FCC Rcd at 4439 n.9; US West Communications, Petition for Authority to Continue to Charge Premium Rates for Access Service After 1992, MM (*sic*) Docket No. 88-287, 8 FCC Rcd 190, 191 n.8 (Com. Car. Bur. 1992) (*US West Order*) (granting a waiver of the *Alternate Technologies Order* to US West).
36 *GTE Order*, 8 FCC Rcd at 4439 (para. 11).
37 *GTE Order*, 8 FCC Rcd at 4440 (para. 12).
38 GTE Reply at 1-2.
39 *Alternate Technology Order*, 6 FCC Rcd at 3772 (para. 108).
40 *Id.* at 3780 (paras. 198-99).
41 *Id.* at 3770 (paras. 90-91).
42 Feature Group D switched access service is the service provided through electronic stored program control offices that permits consumers to obtain access to their preferred interexchange carrier by dialing 1+.
43 GTE Petition at 2.
44 *Alternate Technology Order*, 6 FCC Rcd at 3780 (para. 201).
45 *Id.*
46 *Alternate Technologies Order*, 6 FCC Rcd at 3780 (para. 200).
47 *See supra* note 13. *See also* 47 C.F.R. § 69.113.

is not enough to justify a multi-year extension of the waiver that permits GTE to assess premium access rates for equal access-equivalent service. This reasoning is applicable to all switched access rate elements, and GTE has not made any persuasive argument for exempting the CCL and information surcharge rates. Accordingly, we see no reason to exempt the CCL and information surcharge elements from the less-than-premium switched access charge requirement established by the Commission in the *Alternate Technologies Order*.

15. We emphasize that GTE must support its proposed less-than-premium rates with the cost support information required by the Commission's rules. We believe that GTE should treat this service as a new services filing under our price cap rules.[48] GTE's tariff does not currently distinguish between the full premium service it provides to access customers at the majority of its central offices, and the less-than-premium service it provides to its access customers at the 19 central offices at issue in this waiver request. We expect that the tariff GTE will file in response to this Order will distinguish the two types of service.[49]

16. We conclude that the Commission did not intend its requirement to charge less-than-premium rates at central offices using alternate technologies to result in a change in pricing flexibility for other services. Under the Commission's Rules, carriers are required to exclude new services from their price cap baskets.[50] Accordingly, the introduction of a new service does not affect the carrier's Actual Price Index (API). Because we are requiring GTE to treat its less-than-premium service as a new service, GTE will not be permitted to change its Actual Price Index (API) to reflect the introduction of less-than-premium switched access service. GTE will be required, however, to reflect changes in base year demand resulting from the exclusion of this service from the traffic sensitive basket in future price cap filings.

17. GTE's existing waiver expires on December 31, 1994. We find it to be in the public interest to allow adequate time for the Commission and interested parties to review GTE's proposed new rates. Accordingly, we conclude that there is good cause to grant GTE a waiver of the *Alternate Technologies Order* on our own motion, to continue to charge premium switched access rates at the 19 central offices at issue here, to expire on January 31, 1995. GTE is directed to file less-than-premium switched access rates for those 19 central offices, to take effect on February 1, 1995.

V. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that the petition for waiver filed by GTE Service Corporation IS DENIED.

19. IT IS FURTHER ORDERED that the GTE Telephone Operating Companies SHALL FILE tariff revisions, within ten days of the release date of this Order, to become effective on February 1, 1995, in order to establish less-than-premium access rates which will be applicable to equal access-equivalent switched access service provided from the 19 central offices which are the subject of its petition for waiver. GTE Telephone Operating Companies SHALL NOT be permitted to adjust its Actual Price Index to reflect this tariff filing.

20. IT IS FURTHER ORDERED, pursuant to Section 1.3 of the Commission's Rules, that GTE Service Corporation IS GRANTED a limited extension of its waiver to continue to charge premium switched access rates at the 19 central offices at issue in its petition for waiver, to expire on January 31, 1995.

21. For purposes of compliance with this Order, we waive the notice requirements of Section 61.58 of the Commission's Rules, 47 C.F.R. § 61.58. GTE Telephone Operating Companies should cite the "DA" number of this Order as the authority for this filing.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Chief, Common Carrier Bureau

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[48] The cost support requirements for price cap new services are specified in Section 61.49(g) of the Commission's Rules, 47 C.F.R. § 61.49(g).

[49] The premium and nonpremium categories in the access charge rules were established as a means of offsetting the competitive disadvantage that interexchange carriers other than AT&T suffered because equivalent access was not available to those other carriers. In the *Alternate Technologies Order*, the Commission concluded that there was no difference between the quality of access provided to AT&T and its competitors. *See Alternate Technologies Order*, 6 FCC Rcd at 3778 (para. 178). For this reason, we conclude that GTE should charge less-than-premium switched access rates to all access customers, including AT&T, at these 19 central offices.

[50] Section 61.42(g) of the Commission's Rules, 47 C.F.R. § 61.42(g).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Bell Atlantic Transmittal No. 702
Telephone Companies
Revisions to Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: November 15, 1994; Released: November 16, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On October 6, 1994, the Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 702 to revise Tariff F.C.C. No. 1, its special access collocation tariff. Bell Atlantic proposes to include the construction charges for physical collocation arrangements in Section 19.8 of its tariff. According to Bell Atlantic, these charges represent the actual expenses incurred by Bell Atlantic to implement a physical collocation arrangement in the GTBGMDGB, MCLNVALV, and PITBPADT central offices, located at Gaithersburg, Maryland, McLean, Virginia, and Pittsburgh, Pennsylvania, respectively. Description and Justification at 1. No petitions were filed against this tariff. Transmittal No. 702 is scheduled to take effect on November 20, 1994.

2. This transmittal raises the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*.[1] Therefore, Transmittal No. 702 is suspended for one day, until November 21, 1994, and will be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 702, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Bell Atlantic SHALL FILE tariff revisions within five business days of the release date of this order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Bell Atlantic should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Bell Atlantic shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-579

In the Matter of

US West Communications, Inc.

Petition for Extension of
Waiver of Access Billing
Requirements for Joint Service Provision

ORDER

Adopted: December 15, 1994; Released: December 15, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On November 1, 1994, US West Communications, Inc. (US West) requested an extension of its waiver of the single bill requirement for meet point billing for those cases in which its meet point billing contracts with non-Tier I local exchange carriers (LECs) for local transport service have been cancelled, and the parties have been unable to agree on new terms and conditions.[1] In response to a public notice soliciting comments on US West's request,[2] on November 14, 1994, BellSouth Telecommunications (BellSouth) filed a pleading captioned "Comments on Request for Waiver of US West and BellSouth Request for a Similar Waiver for Itself and All Other LECs, if and to the Extent a Waiver is Required."

2. In the *Transport Waiver Order*, the Common Carrier Bureau (Bureau) granted a one-year waiver of the single bill requirement for parties to meet point billing arrangements that maintain different local transport rate structures.[3] US West seeks an extension of that waiver until December 31, 1995, approximately 12 months after the expiration of the waiver, or until the Commission has acted on US West's petition for rulemaking, whichever occurs later.[4] Although BellSouth maintains that it is complying with the Bureau's single bill requirement, it nonetheless requests a similar waiver of the meet point billing single bill requirement for itself and all other LECs, if and to the extent the Bureau determines that a waiver is required.

3. At the conclusion of the pleading cycle on December 7, 1994, we determined that there is insufficient time in which to review thoroughly the waiver requests of US West and BellSouth prior to the expiration of the current waiver on December 17, 1994. In order to review fully these requests, we are briefly extending the December 17 deadline for compliance with the single bill requirement for transport service for US West, BellSouth and all other LECs.

4. Accordingly, IT IS ORDERED that the deadline for local exchange carriers to comply with the meet point billing single bill requirement IS EXTENDED pending final review by the Bureau of US West's and BellSouth's waiver requests.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

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[1] On November 1, 1994, US West also filed a petition for rulemaking to eliminate entirely the single bill requirement for transport service. *See* Public Notice, Report No. 2040, released Nov. 7, 1994, soliciting comments on US West's petition for rulemaking.

[2] *See* Public Notice, DA 94-1278, released Nov. 16, 1994.

[3] In the Matter of Petitions for Waiver of Transport Rate Structure and Pricing Requirements, Order, 9 FCC Rcd 796 (Com. Car. Bur. 1993) (*Transport Waiver Order*). *See also* In the Matter of Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, Phase II, Order, 65 Rad. Reg. (P&F) 2d 650 (para. 73) (Com. Car. Bur. 1988).

[4] Notwithstanding US West's assertion that its current waiver of the single bill requirement will expire on December 31, 1994, we note that the waiver will expire on December 17, 1994, one year from the release date of the *Transport Waiver Order*. *See Transport Waiver Order* 9 FCC Rcd at 811 (para. 41).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICRONET, INC. File No. I-T-C-95-017

Application for authority to acquire and operate facilities for provision of communications services between the United States and various overseas points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: December 27, 1994; Released: January 18, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED, that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED, that application File No. I-T-C-95-017 IS GRANTED, and MicroNet, Inc. is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT satellites, for provision of Intelsat Business Services (IBS), International Television Service and Datanet Service between the United States and the international points listed in Comsat's tariffs for the space segment of these services;

b. lease from Comsat and operate the satellite circuits specified in Appendix A, between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites, connecting with similar facilities between the satellites and the overseas points listed in Appendix A, furnished by its correspondents;

c. lease from PanAmerican Satellite Corp. (PAS) and operate the satellite circuits specified in Appendix B, between appropriately licensed U.S. earth stations and the PAS-1 and PAS-2 satellites, connecting with similar circuits between the satellites and the overseas points listed in Appendix B, furnished by its correspondents;

d. lease from the Columbia/TDRSS International Satellite System (TDRSS) and operate the satellite circuits specified in Appendix C, between appropriately licensed U.S. earth stations and the TDRS-41 satellite, connecting with similar circuits between the satellite and the overseas points listed in Appendix C, furnished by its correspondents;

e. lease from Orion Corporation and operate the satellite circuits specified in Appendix D, between appropriately licensed U.S. earth stations and the Orion F1 satellite, connecting with similar circuits between the satellite and the overseas points listed in Appendix D, furnished by its correspondents;

f. lease and operate necessary connecting facilities in the United States;

g. lease a one-half interest in and operate any necessary overseas connecting facilities; and

h. use the facilities authorized herein to provide MicroNet's regularly authorized services, including switched voice and data, and private line services, between the United States and the points specified in Appendices A, B, C and D.

3. IT IS FURTHER ORDERED that neither MicroNet nor any persons or companies directly or indirectly controlling or controlled by MicroNet, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MicroNet or any persons or companies controlling or controlled by MicroNet are parties.

4. IT IS FURTHER ORDERED that our authorization of MicroNet to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in the Appendices -- that is, private lines which originate in the United States and terminate in one of the countries listed in the Appendices or which originate in one of the countries listed in the Appendices and terminate in the United States. In addition, MicroNet may not -- and MicroNet's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the destination country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending.*

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1, PAS-2, TDRS-41 or Orion F1 satellites.

9. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

10. This Order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

Appendix A

COUNTRIES TO BE SERVED VIA INTELSAT
(10-64 Kbps equivalent circuits)

Up to ten 64 kbps circuits between the U.S. and each of the following countries.

Afghanistan
Algeria
Angola
Argentina
Armenia
Australia
Austria
Azerbaijan
Bahamas
Bahrain
Bangladesh
Barbados
Belgium
Benin
Bhutan
Bolivia
Brazil
Burkina Faso
Cameroon
Canada
Cape Verde
Central African Republic
Chad
Chile
China, People's Republic
Columbia
Congo
Costa Rica
Cote d'lvoire
Croatia
Cyprus
Czech Republic
Denmark
Dominican Republic
Ecuador
Egypt
El Salvador
Ethiopia
Fiji
Finland
France
Gabon
Germany
Ghana
Greece
Guatemala
Guinea
Haiti
Honduras
Hungary
Iceland
India
Indonesia
Iran
Iraq
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kenya
Korea, South
Kuwait
Lebanon
Libya
Liechtenstein
Luxembourg
Madagascar
Malawi
Malaysia
Mali
Mauritania
Mauritius
Mexico
Micronesia
Monaco
Morocco
Mozambique
Namibia
Nepal
Netherlands
New Zealand
Nicaragua
Niger
Nigeria
Norway
Oman
Pakistan
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Portugal
Qatar
Romania
Russian Fed.
Rwanda
Saudi Arabia
Senegal
Singapore
Somalia
South Africa
Spain
Sri Lanka
Sudan
Swaziland
Sweden
Switzerland
Syria
Tanzania
Thailand
Togo
Trinidad and Tobago
Tunisia
Turkey
Uganda
United Arab Emirates
United Kingdom
Uruguay
Vatican City
Venezuela
Vietnam
Yemen Arab Republic
Yugoslavia
Zaire
Zambia
Zimbabwe

APPENDIX B

COUNTRIES TO BE SERVED VIA PAS-1
(NON-INTERCONNECTED)

Up to 10 64-Kbps voice grade circuits between the United States and each of the following countries:

Ku-Band Countries:

Anguilla
Austria
Azerbaijan
Bahamas
Belgium
Bermuda
British Virgin Islands
Cayman Islands
Czech Republic
Denmark
France
Germany
Greece
Ireland
Italy
Luxembourg
Monaco
Montserrat
Netherlands
Portugal
Romania
Russian Fed.
Spain
Sweden
Switzerland
Turks & Calicos
United Kingdom
Yugoslavia

C-Band Countries:

Anguilla
Argentina
Aruba
Bahamas
Barbados
Bermuda
Bolivia
Brazil
British Virgin Islands
Cayman Islands
Chile
Columbia
Costa Rica
Dominican Republic
Ecuador
Guatemala
Haiti
Honduras
Jamaica
Mexico
Montserrat
Netherlands Ant.
Panama
Paraguay
Peru
Trin. & Tob.
Turks & Caicos
Uruguay
Venezuela

COUNTRIES TO BE SERVED VIA PAS-1
INTERCONNECTED

Up to six 64-kbps voice-grade circuits between the United States and each of the following countries:

Ku band countries	C-band countries
Azerbanjan	Bahamas
Bahamas	Costa Rica
Czech Republic	Dominican Republic
Portugal	Netherlands Antilles
Romania	Panama
Russian Federation	Peru
United Kingdom	

COUNTRIES TO BE SERVED VIA PAS-2

Up to ten 64-kbps voice-grade circuits (non-interconnected) and ten 64-kbps voice-grade circuits (interconnected) between the United States and the United Kingdom (Ku-band and C-band).

APPENDIX C

COUNTRIES TO BE SERVED VIA TDRS-41
NON-INTERCONNECTED

Up to ten 64-kbps voice-grade circuits between the United States and each of the following countries:

Austria
Bahamas
Belgium
Canada
Denmark
Finland
France
Germany
Ireland
Israel
Jamaica
Liechtenstein
Luxembourg
Mexico
Netherlands
Portugal
Sweden
Switzerland
Turkey
United Kingdom

COUNTRIES TO BE SERVED VIA TDRS-41
INTERCONNECTED

Up to six 64-kbps voice-grade circuits between the United States and each of the following countries:

Germany
United Kingdom

APPENDIX D

COUNTRIES TO BE SERVED VIA ORION F1
NON-INTERCONNECTED

up to ten 64-kbps voice-grade circuits between the United States and each of the following countries:

Austria
Belgium
Denmark
France
Germany
Ireland
Italy
Luxembourg
Netherlands
Norway
Poland
Sweden
United Kingdom

COUNTRIES TO BE SERVED VIA ORION F1
INTERCONNECTED

Up to six 64-kbps voice-grade circuits between the United States and each of the following countries:

Germany
Ireland
Netherlands
Poland
Sweden

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 93-198

In the Matter of

Preparation for International
Telecommunication Union
World Radiocommunication
Conferences

ORDER

Adopted: December 23, 1994; Released: January 18, 1995

By the Commission:

1. By this action, the Commission terminates its proceeding initiated to seek public comment regarding U.S. proposals and positions for the 1993 International Telecommunication Union (ITU) World Radio Conference (WRC-93).

2. The 1992 ITU Additional Plenipotentiary Conference (APP) adopted a major restructuring of the ITU.[1] Part of the restructuring was a recommendation that World Radiocommunication Conferences (WRCs) normally convene every two years, and that a four year conference planning cycle be initiated. Thus, each WRC would consider current substantive issues, develop a recommended agenda for the next WRC in two years, and recommend a preliminary agenda for the following WRC in four years. The first of these regularly scheduled conferences, WRC-93, convened in Geneva on November 15, 1993.

3. In preparation for WRC-93, on June 24, 1993, we initiated the instant proceeding to seek public comment regarding U.S. proposals and positions.[2] On September 17, 1993, the Commission and the National Telecommunication and Information Administration jointly forwarded their recommended proposals for the conference to the Department of State.[3] No other action has been taken in this proceeding.

4. WRC-93 adopted recommendations to the ITU's Administrative Council for a substantive agenda for WRC-95, and a preliminary agenda for WRC-97. Because WRC-93 has concluded, and no further purpose would be served by keeping this docket open, we are hereby terminating this proceeding. Public comment concerning future World Radiocommunication Conferences will be sought in IC Docket No. 94-31.[4]

5. Accordingly, IT IS ORDERED that, pursuant to the authority of sections 4(i) and 303(r) of the communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Willian F. Caton
Acting Secretary

[1] *See Final acts of the additional Plenipotentiary Conference*, Geneva, 1992. Specifically for restructuring of the ITU, *see* Articles 7-14 of the *Constitution* (CS).

[2] *Notice of Inquiry*, ET Docket No. 93-198, 8 FCC Rcd 4512 (1993).

[3] *See* FCC Press Release, # 34994, September 21, 1993.

[4] *See Notice of Inquiry*, IC Docket 94-31, 9 FCC Rcd 2430 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

NORTH AMERICAN CATHOLIC EDUCATIONAL PROGRAMMING FOUNDATION, INC.
Amarillo, Texas — File No. BPLIF-910401DE

TEXAS STATE TECHNICAL COLLEGE
Amarillo, Texas — File No. BPLIF-910426DB

AMARILLO JUNIOR COLLEGE DISTRICT
Amarillo, Texas — File No. BPLIF-910722DC

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels D1-D4

MEMORANDUM OPINION AND ORDER

Adopted: January 3, 1995; Released: January 19, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of North American Catholic Educational Programming Foundation, Inc. (NACEPF), Texas State Technical College (TSTC), and Amarillo Junior College District (Amarillo), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the area of Amarillo, Texas.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). All of the applicants are qualified to be ITFS licensees. Amarillo is a school district that is accredited by the Southern Association of Colleges and Schools and that is applying to provide ITFS service to students enrolled at schools within its jurisdiction. TSTC is a state vocational college that is accredited by the Southern Association of Colleges and Schools and that is applying to provide ITFS service to its own enrolled students at off-campus locations. While NACEPF is not itself local to the Amarillo area and is not itself accredited, the applicant has submitted the requisite letters of intended use from accredited schools that will use its service and has documented the establishment of a local programming committee in the community.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Amarillo is entitled to four points because it is a school district that proposes to serve the formal educational needs of students at schools located within its jurisdiction. TSTC is entitled to four points because it is a vocational college that proposes to serve the formal educa-

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

tional needs of its own enrolled students. NACEPF, a national organization based in Providence, Rhode Island, seeks to serve the Amarillo area. Because its headquarters is not located within the area it proposes to serve, NACEPF is not entitled to points for being a local applicant.

Accreditation. Amarillo and TSTC are entitled to three points because they are accredited by the Southern Association of Colleges and Schools. Although NACEPF proposes to serve accredited institutions, a factor which satisfies its basic eligibility, it is not an accredited entity in its own right in the area it proposes to serve, the factor necessary for earning merit points under the accreditation criterion. Therefore, NACEPF is not entitled to any points by this measure. See *Instructional Television Fixed Service-Second and Report and Order Reconsidered in MM Docket No. 83-523*, 59 RR 2d 1355, 1370 (1986); and *Broken Arrow Public School District #3*, 9 FCC Rcd 5783 (1994).

Four-Channel Limitation. None of the applicants is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Amarillo's illustrative schedule propose an average of 75.27 hours of formal educational programming per channel per week, while its program grid proposes an average of 64.75 hours of such ITFS programming per channel per week. Using the lower of these two averages, Amarillo is entitled to two programming merit points. TSTC's illustrative schedule proposes an average of 38.75 hours of formal educational programming per channel per week, while is program grid proposes an average of 41 hours of such ITFS programming per channel per week. Again, using the lower of the two averages, TSTC is entitled to one programming merit point.[3] In its illustrative schedule and program grid, NACEPF proposes an average of 20 hours of formal educational ITFS programming per channel per week. Because the amount of programming proposed does not reach the threshold amount at which merit points are awarded, NACEPF is entitled to no programming merit points.

E- and F- Channel Group Relocation. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, no applicant is entitled to one point for such applicants.

Total. Amarillo is entitled to four points for being local, three points for being accredited, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. TSTC is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational ITFS programming per channel per week, for a total of ten points. NACEPF is entitled to a total of two points for observing the four-channel limitation. Thus, the tentative selectee is Amarillo.

OTHER MATTERS

5. Amarillo does not propose to lease its excess capacity for non-ITFS use. Rather, it intends to finance the construction and operation of its station by reliance upon a grant from the National Telecommunications and Information Administration (NTIA). In January of 1993, Amarillo submitted a copy of its NTIA grant application. The certification of reliance on NTIA funding in response to Question 1(a) of Section III, FCC Form 330, and subsequent filing of an application for funds establish "reasonable assurance" of Amarillo's financial ability to construct and operate the proposed station. Accordingly, our concern will be directed to focusing on whether the grant relied upon actually has been made. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd at 5926-27.

6. No petitions to deny or informal objections have been filed against Amarillo's application, and we find Amarillo fully qualified to be an ITFS licensee. We also conclude that grant of Amarillo's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the applications of Texas State Technical College (BPLIF-910426DB) and North American Catholic Educational Programming Foundation, Inc. (BPLIF-910401DE) ARE DENIED, and the application of Amarillo Junior College District (BPLIF-910722DC) IS GRANTED, subject to the condition that in a reasonable time, the applicant shall submit to the Chief, Distribution Services Branch information demonstrating that it has received the proposed funding from the National Telecommunications and Information Administration.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] On August 18, 1992, TSTC amended its application, revising its illustrative schedule to propose an average of 41 hours of formal educational ITFS programming per channel per week. If considered, TSTC's amendment would upgrade its comparative position. However, an applicant's comparative position cannot be enhanced by amendments filed after the "B" cut-off date which, in this case, was September 20, 1991. Therefore, the TSTC amendments will not be considered. See *Second Report and Order*, 101 FCC 2d at 74.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application of

Hicks Broadcasting Corporation
To Make Changes in Authorized
Facilities of KTSR(FM),
College Station, Texas

File No. BPH-900706IB

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1994; Released: January 18, 1995

By the Commission:

1. The Commission has under consideration an Application for Review filed on November 21, 1991 by Roy E. Henderson ("Henderson"). Henderson requests review of an action by the Chief, Audio Services Division by letter dated October 22, 1991. That decision denied Henderson's Petition for Reconsideration of the Commission's grant of the above-captioned application to Hicks Broadcasting Corp. ("Hicks").[1]

2. The circumstances surrounding Henderson's Application for Review arise from the Commission's rule making proceeding in *Report and Order* in MM Docket 88-48, 5 FCC Rcd 2660 (MMB 1990) ("Docket 88-48"). In Docket 88-48 the Mass Media Bureau, *inter alia*, granted Hicks' proposal to substitute Channel 297C3 for Channel 221A at College Station, Texas, and to modify Hicks' license for KTSR(FM) to specify Channel 297C3. Henderson had filed reply comments and a Petition for Rule Making in Docket 88-48, proposing an upgrade of Channel 236C2 for Channel 236A at Caldwell, Texas. However, the Bureau declined to consider his proposal. On May 24, 1990, Henderson filed an Application for Review of the Bureau's decision. On April 3, 1991, the Commission denied Henderson's Application for Review, holding that the Bureau properly disregarded Henderson's filing because his proposal was not in compliance with the minimum spacing requirements and because, since "Henderson was not a permittee when he purportedly filed his petition for rule making . . . he was ineligible to request an upgrade pursuant to Section 1.420(g)(3) of the Rules." *Memorandum Opinion and Order* in MM Docket 88-48, 6 FCC Rcd 2050 (1991) ("*Memorandum Opinion and Order I*").[2] On May 17, 1991, Henderson filed a Petition for Reconsideration of *Memorandum Opinion and Order I*. On June 14, 1993, the Commission denied Henderson's Petition for Reconsideration. *Memorandum Opinion and Order*, 8 FCC Rcd 4281 (1993). ("*Memorandum Opinion and Order II*"). There have been no further appeals of that matter.

3. On July 6, 1990, Hicks filed a construction permit application to implement the changes authorized in Docket 88-48. The staff granted that application on November 20, 1990. On December 28, 1990, Henderson filed a Petition for Reconsideration of that grant, noting that his Application for Review of the Commission's determination in Docket 88-48 was pending. Henderson requested that the Commission vacate the grant of the construction permit until "such time as the Commission's *Report and Order* in Docket 88-48 granting the essential authority and basis for that construction permit becomes final." By letter dated October 22, 1991 the Chief, Audio Services Division (Ref. 8920-CWH) denied Henderson's December 28, 1990 Petition for Reconsideration because the Commission had, by that time, denied Henderson's Application for Review concerning Docket 88-48 in *Memorandum Opinion and Order I*.

4. The instant Application for Review of the October 22, 1991 letter was filed on November 21, 1991. The Application for Review argues that, because Henderson had on May 17, 1991 filed a Petition for Reconsideration of *Memorandum Opinion and Order I* in Docket 88-48, the October 22, 1991 letter was improper. Henderson argues that the Petition for Reconsideration filed May 17, 1991 should have been disposed of first.

5. The relief that Henderson sought in his December 28, 1990 Petition for Reconsideration was, as noted, that action on the subject construction permit application be stayed until the Commission's action in Docket 88-48 is final. The Commission's *Memorandum Opinion and Order II* denied Henderson's Petition for Reconsideration in Docket 88-48 and terminated that proceeding. No judicial appeal of that decision has been filed. Thus, even assuming that grant of Hicks' construction permit prior to finality in Docket 88-48 was premature,[3] the instant Application for Review is now moot to the extent that it rests on that argument. The Application for Review also argues that the October 22, 1991 letter from the Chief, Audio Services Division failed to note that on May 6, 1991, Hicks filed a counterproposal in MM Docket 91-58 wherein Hicks proposed to substitute Channel 236C2 for Channel 297C3 at College Station, Texas. Henderson asserts that Hicks' proposal to seek a further upgrade in Docket 91-58 demonstrates that Hicks was disingenuous in seeking Channel 297C3 in Docket 88-48. This argument is without merit. Hicks' effort to seek a further upgrade in Docket 91-58 does not provide any evidence of improper behavior or in any way negate the validity of the Commission's earlier authorization in Docket 88-48. Thus we reject Henderson's contention that we should withhold action here until resolution of MM Docket 91-58.[4]

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[1] On December 6, 1991, Hicks filed an Opposition to the Application for Review and on December 19, 1991, Henderson filed a Reply to that Opposition.

[2] Petitions for Rule Making in Docket 88-48 had to be filed by the April 21, 1988 comment date. As of that date, Henderson had entered into a settlement agreement with a competing applicant, but was not yet a permittee.

[3] 47 C.F.R. Section 1.420(f) states, in pertinent part: The filing of a petition for reconsideration of an order modifying an authorization to specify operation on a different channel shall stay the effect of a change in the rules pending action on the petition.

[4] We note that an *Order to Show Cause* in Docket 91-58 was adopted August 12, 1994 by the Chief, Policy and Rules Division of the Mass Media Bureau ordering Roy E. Henderson, permittee of station KHEN(FM), Channel 236A, Caldwell, Tex-

6. ACCORDINGLY, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, the "Application for Review" filed on November 21, 1991 by Roy E. Henderson IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

as, to show cause why his constuction permit should not be modified to specify operation on Channel 297A. 9 FCC Rcd 4425 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

File No. I-T-C-93-123(aaa)

Application to amend blanket authorization to lease and operate satellite voice-grade bearer circuits between the United States and points in Central America, South America, the Caribbean area and Africa during the years 1993-1997.

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

ORDER AND AUTHORIZATION

Adopted: December 30, 1994; Released: January 18, 1995

By the Chief, Telecommunications Division:

1. Upon consideration of the above-captioned uncontested application, filed by American Telephone and Telegraph Company (AT&T) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-123(aaa) IS GRANTED, and AT&T's blanket authorization to lease and operate satellite voice-grade circuits via appropriate INTELSAT satellites between the United States and points in Central America, South America, the Caribbean area and Africa for the years 1993-1997 is further amended to add Madagascar as an authorized point of communication.[1]

3. All other terms and conditions set forth in AT&T's initial blanket authorization for the years 1993-1997 remain in force.

4. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

[1] AT&T's initial blanket authorization was approved in File No. I-T-C-93-006, 8 FCC Rcd 970 (1993), and was amended in File No. I-T-C-93-123, 8 FCC Rcd 4317 (1993), and further amended in File No. I-T-C-93-123, 8 FCC Rcd 8392 (1993), and File No. I-T-C-93-123(aa), 9 FCC Rcd 3381 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-93-123(a)

Application to amend blanket authorization to lease and operate satellite voice-grade bearer circuits between the United States and points in Central America, South America, the Caribbean area and Africa during the years 1993-1997.

ORDER AND AUTHORIZATION

Adopted: December 30, 1994; Released: January 18, 1995

By the Chief, Telecommunications Division:

1. The Commission is considering the above-captioned application, filed by American Telephone and Telegraph Company (AT&T) pursuant to Section 214 of the Communications Act of 1934, as amended, which requests authority to provide AT&T's SKYNET service between the United States mainland and the U.S. Virgin Islands, a domestic point. No comments were received on this application. In its application, AT&T states that the requested authority would be incidental to the primary international service. By its prior Order and Authorization,[1] the Commission granted authority to AT&T to provide SKYNET service between the United States and Puerto Rico. We now find that grant of authority to provide SKYNET service to the U.S. Virgin Islands is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-123(a) IS GRANTED, and AT&T's blanket authorization to lease and operate satellite voice-grade circuits via appropriate INTELSAT satellites between the United States and points in Central America, South America, the Caribbean area and Africa for the years 1993-1997 is further amended to authorize AT&T to acquire units of satellite utilization from Comsat for the provision of its SKYNET service between the United States mainland and the U.S. Virgin Islands.[2]

3. IT IS FURTHER ORDERED that this authorization is limited to the provision of SKYNET service between the United States mainland and the U.S. Virgin Islands which is incidental to and part of primary international communications.

4. All other terms and conditions set forth in AT&T's initial blanket authorization for the years 1993-1997 remain in force.

5. This order is issued under Section 0.261 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Diane J. Cornell
Chief, Telecommunications Division
International Bureau

[1] *See American Telephone and Telegraph Company*, 8 FCC Rcd 8392 (1993), released November 29, 1993, File No. I-T-C-93-123.

[2] AT&T's initial blanket authorization was approved in File No. I-T-C-93-006, 8 FCC Rcd 970 (1993), and was amended in File No. I-T-C-93-123, 8 FCC Rcd 4317 (1993), and further amended in File No. I-T-C-93-123, 8 FCC Rcd 8392 (1993), and File No. I-T-C-93-123(aa), 9 FCC Rcd 3381 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACC LONG DISTANCE CORP.
Complainant,

v. File No. E-91-94

YANKEE MICROWAVE, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: December 23, 1994; Released: January 18, 1995

By the Commission:

I. INTRODUCTION

1. In this order, we address an Application for Review and a Motion for Expedited Review filed by ACC Long Distance Corp. (ACC). ACC seeks reversal of an order issued by the Chief, Common Carrier Bureau (Bureau), which denied its complaint in the above-captioned proceeding.[1] In its underlying complaint, ACC alleged that rates contained in a 1985 contract between a non-dominant specialized common carrier, Yankee Microwave, Inc. (Yankee), and another carrier, Petricca Communications Systems, Inc. (Petricca), were patently unlawful under Sections 201(b) and 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201(b), 202(a)[2] We have carefully examined the record of this proceeding in light of ACC's Application for Review and its Motion for Expedited Review.[3] For the reasons discussed below, we affirm the Bureau's decision to reject ACC's complaint.

II. BACKGROUND

2. The background of this proceeding is discussed at some length in the *Bureau Order*. A more detailed recitation of the pertinent facts surrounding the contract offering at issue will be helpful to our analysis of ACC's Section 201(b) and 202(a) claims, however.

3. In or around 1982, Yankee commenced development of a digital microwave transmission network to carry voice and data traffic between New York City and Boston, Massachusetts.[4] According to Yankee, it did not plan to begin construction of the digital microwave network until relay sites and frequencies had been located for the entire New York to Boston route.[5] In 1983, Yankee secured sites for constructing portions of its network to carry traffic between Boston, Massachusetts and Trumbull, Connecticut and between New York City and White Plains, New York, but was unable to secure sites and frequencies to connect these two legs of its proposed Boston to New York network.[6] In October 1983, following a request for service from Cablevision, Yankee filed applications for 8 digital microwave stations linking Boston and Norwalk, Connecticut.[7] Cablevision subsequently withdrew its service request.[8]

4. In 1984, Petricca discussed with Yankee the possibility of securing digital microwave service between Pittsfield, Worcester and Springfield, Massachusetts, and Glastonbury, Connecticut.[9] On or about January 31, 1985, Yankee and Petricca, both common carriers, entered into a six-year intercarrier agreement for digital microwave service to be provided by Yankee over the requested routes (Petricca Contract).[10] The agreement required Yankee to construct, operate and maintain a microwave network connecting Petricca's Pittsfield, Springfield, Worcester, and Glastonbury locations.[11] The service agreement was amended in April, 1985 to delete Springfield and add Boston as a point of connection.[12] The Petricca Contract initially required Yankee to construct microwave transmission facilities at a total of seven service sites (hops), three of which Yankee claims were not envisioned as part of its Boston to New York network.[13] The amended contract required the construction of two additional hops at Maynard, Massachusetts and Boston to provide service for Petricca to Boston.[14] Under the contract, beginning in February 1987, Yankee would provide Petricca three T1 circuits between Pittsfield and Glastonbury at a monthly rate of $5,745.60 per circuit, two T1 circuits between Pittsfield and Boston at a monthly rate of $7,937.30 per circuit, and two T1 circuits between Pittsfield and Worcester at a monthly rate of $7,291.30 per

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[1] XMemorandum Opinion and Order, 8 FCC Rcd 85 (Com. Car. Bur. 1993) (*Bureau Order*).

[2] Section 201(b) states that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate] communication service, shall be just and reasonable...."

Section 202(a) makes it unlawful for a common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service...."

[3] In seeking expedited review, ACC contends that Section 208(b) of the Act, which establishes time limits for final Commission action on some but not all types of complaints, is applicable to its complaint. Yankee disagrees with ACC's contentions with respect to the applicability of Section 208(b), but also seeks expedited action on ACC's Application for Review. *See* Comments on Motion for Expedited Review, filed February 10, 1993. In light of our action herein adopting the material findings and conclusions of the *Bureau Order* in a reviewable final decision, we need not resolve whether ACC's complaint falls within the purview of Section 208(b).

[4] Yankee Brief at 6.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 6-7.

[8] *Id.*

[9] *Id.*

[10] We will use the term "Petricca Contract" to refer to the Petricca/Yankee agreement as amended. A copy of the Petricca Contract is attached to Yankee's Answer filed July 1, 1991, at Tabs 4 and 5.

[11] Yankee Brief at 8; Yankee Answer, Tab 4.

[12] *Id.* at 9.

[13] *Id.*

[14] *Id.*

circuit.[15] The total payment due for the six-year term of the contract was $3,958,920.[16] The record indicates that the rates in the Petricca Contract would save Petricca $40,000 per monthcompared to the rates Petricca was then paying AT&T for analog service, a savings of roughly 40%.[17]

5. During 1985, Yankee completed construction of the majority of the microwave facilities designated for use by Petricca under the Petricca Contract. Final construction was not completed until late 1986 due to delays in obtaining the required local and state governmental approvals to construct the Petricca tower on Washington Mountain in Pittsfield.[18] Full service to Petricca under the terms of the Service Agreement began on February 1, 1987.

6. On February 3, 1987, Petricca's business was acquired by ACC Corp., parent company of the complainant, ACC. Pursuant to the asset purchase agreement between ACC Corp. and Petricca, ACC Corp. acquired substantially all of Petricca's assets and liabilities except the Petricca contract.[19] In a separate contract with Petricca, however, ACC agreed to guarantee Petricca's payment obligations under the Petricca Contract for a period of 18 months.[20] During this 18-month period, ACC provided Petricca with the funds to make the payments required by the Petricca Contact.[21]

7. In July 1987, Yankee activated new circuits for ACC as a separate customer over the Yankee network from Pittsfield to New York City.[22] Yankee subsequently activated other circuits for ACC between Pittsfield and Glastonbury and Pittsfield and Boston, the same routes over which Petricca took service under the Petricca Contract.[23] ACC's service agreements with Yankee covered three year periods and required Yankee to provide ACC five T1 circuits between Pittsfield and Glastonbury at a monthly rate $2,146, and one T1 between Pittsfield and Boston at a monthly rate of $2,850.[24] These rates were substantially lower than those assessed to Petricca under its agreement with Yankee.

8. In October 1987, ACC asked Yankee to reduce the rates charged to Petricca under the Petricca Contract to match those ACC was paying for its own circuits over the same routes.[25] In November 1987, Yankee submitted a revised contract to ACC with lower rates for the Petricca circuits.[26] For reasons not clear from the record, Yankee and ACC never reached agreement on new contract terms.[27] In August 1988, ACC's guarantee obligation under its agreement with Petricca expired and it ceased making payments to Petricca. In a letter dated August 23, 1988, Petricca advised Yankee that it would no longer make the monthly payments called for by the Petricca Contract.[28] In September 1988, ACC advised Yankee that all traffic from Pittsfield had been moved from Petricca circuits to ACC circuits and that it would no longer pay for the Petricca circuits.[29]

9. Yankee thereafter brought an action for breach of contract and other claims against ACC and Petricca in the Superior Court for Berkshire County, Massachusetts (the state court).[30] On April 11, 1991, ACC filed a complaint with the Commission pursuant to Section 208[31] asking the Commission to: (1) abrogate portions of the Petricca contract rates as unlawful under Sections 201(b) and 202(a) of the Act; (2) direct Yankee to file tariffed rates for the Petricca service as allegedly required by the Petricca Contract; (3) prescribe the rates that Petricca should have been charged for the service; and (4) order Yankee to refund payments made by Petricca in excess of the prescribed rates.[32] On May 27, 1992, the state court granted a motion filed by the defendants to stay the action before it "until such time as the Federal Communications Commission shall, by approval of a tariff filed by [Yankee] or otherwise, have determined the level of just and reasonable' rates that [Yankee] is permitted to charge [Petricca] for common carrier microwave transmission services."[33]

10. The Bureau's consideration of ACC's Section 201(b) claims centered around ACC's contention that Yankee's rates to Petricca were excessive and not related to its costs of providing the digital microwave service. ACC argued that Yankee's use of an individual case basis (ICB)[34] methodology to derive the Petricca contract rates improperly allocated 100% of Yankee's network costs to Petricca and, therefore, produced "grossly" excessive charges within the

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[15] *Id.* at 9-10 and Tab 9.

[16] *Id.* at 9-10 and Tabs 4 and 5.

[17] *Id.* at 26 and Tab 6 at para. 5.

[18] *Id.* at 14-15. According to Yankee, Petricca's "13-14 month delay in securing the Washington Mountain site, and the consequent delay in commencement of service, cost Yankee $500,000 - $600,000 in unanticipated expenses for salaries, insurance, interest on loans ... etc. *Id.*, footnote 35 and Tab 1, para. 6.

[19] *Id.* at 18.

[20] ACC Brief at 15-16.

[21] *Id.*

[22] Yankee Brief at 18.

[23] Between 1988 and 1990, Yankee provided service to 11 other customers over its digital microwave network, in each case at rates lower than those contained in the Petricca Contract. These service agreements were for 1-3 year periods and none involved service over the same routes used by Petricca. *See* Yankee Brief at 19-22 and Tab 9.

[24] *Id.* at 19 and Tab 7.

[25] *Id.* at 18-20 and Tab 9.

[26] *Id.* at 19.

[27] *See* Yankee Reply Brief at 29 and Tab 8; ACC Reply Brief at 31-33.

[28] *Id.* at 11 and Tab 6. Under the Service Agreement, Petricca had the option to discontinue service prior to the expiration of the contract term by fulfilling specified conditions. *See* Yankee Answer, Tab 5 at 6 (if service discontinued by customer before end of agreed term, customer liable for contract price reduced by 1/72 for each month of use for which payment received). Petricca discontinued service without complying with such conditions.

[29] Yankee Brief at 11-12.

[30] Yankee Microwave, Inc. v. ACC Corp. *et al.*, Superior Court, No. 92-0065. It has been more than four years since Yankee provided digital microwave service to its former customer, Petricca. Yankee now neither holds itself out to provide such service nor has the necessary radio authorizations to do so. Yankee voluntarily surrendered the last of its licenses for digital microwave facilities on January 22, 1993.

[31] 47 U.S.C. § 208.

[32] *See Bureau Order*, 8 FCC Rcd at 86; ACC Complaint ¶ 80.

[33] *Id.*

[34] *See* Local Exchange Carriers' Individual Case Basis DS3 Service Offerings (*LEC ICB Order*), 4 FCC Rcd 8634, 8641-43 (1989) (use of individual case basis rates not unreasonable where independent telephone companies found to have insufficient experience with DS3 service after a period of five years to justify a requirement that they file averaged rates).

meaning of Section 201(b).[35] The Bureau found that the record reasonably supported findings that Petricca sought to lock in, for a six-year term, rates that were 40% lower than those it was then paying AT&T and that the Petricca Contract was executed by two parties, neither of which had a bargaining advantage, in a competitive market where alternative service providers existed.[36] The Bureau further determined that Yankee had not allocated 100% of its network costs to Petricca and was not persuaded that the Petricca Contract rates were not reasonably related to Yankee's actual allocated costs for the facilities used by Petricca. The Bureau also rejected ACC's claim that Yankee's use of ICB rates was *per se* unlawful.[37]

11. The Bureau denied ACC's claims that Yankee engaged in unjust discrimination by offering rates in subsequent contracts that were lower than the rates negotiated in the Petricca contract. The Bureau determined that nothing in Section 202(a) requires carriers to renegotiate their private contractual agreements to allow customers to avail themselves of lower rates so long as there is a "neutral rational basis" underlying the disparate rates.[38] The Bureau found that the fact that Yankee had to construct facilities in order to fulfill the Petricca Contract and the fact that Yankee's generally available rates steadily declined from the time of the Petricca Contract to the time of subsequent contracts with other customers constituted a neutral rational basis for the rate disparities.[39]

III. CONTENTIONS ON REVIEW

12. ACC asks the Commission to reverse the Bureau's decision. ACC contends that the Bureau improperly approved Yankee's use of ICB rates and erroneously failed to find the Petricca Contract rates to have been both excessive under Section 201(b) and unreasonably discriminatory under Section 202(a). ACC also asserts that: (1) the Bureau's "refusal" to order Yankee to file an interstate tariff conflicts with its duty to enforce Section 203(a) of the Act in accordance with *American Telephone and Telegraph Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *aff'd, MCI Telecommunications Corp. v. AT&T*, 114 S. Ct. 2223 (1994); (2) the Bureau applied Section 415(b) "to ACC's request for declaratory rulings" contrary to *Bunker Ramo Corp. v. Western Union Telegraph Co.*, 31 FCC 2d 449, 453 (Rev. Bd. 1971); and (3) the Bureau erred in placing the burden of proof on ACC to show that Yankee's rates violated Sections 201 and 202 of the Act.[40] Yankee responds that ACC's challenges to the Bureau's decision consist largely of mischaracterizations of the ruling, inaccurate or irrelevant procedural arguments, and a number of unwarranted and groundless attacks on the Bureau's "motives" in relation to "the recent D.C. Court of Appeals decision vacating the Commission's forbearance rules for non-dominant carriers."[41]

IV. DISCUSSION

13. We begin by addressing ACC's principal argument -- that the Bureau erred in refusing to find the Petricca contract rates unlawful under Sections 201(b) and 202(a) and to prescribe the rates Yankee should have charged Petricca.[42] We then address other arguments raised by ACC.

A. Section 201(b) and 202(a)

14. While we conclude that the Bureau correctly denied ACC's complaint, we believe it necessary to clarify the legal basis for such denial. ACC, which is not a party to the Petricca Contract, asked the Commission, in effect, to declare unlawful and abrogate a contract entered into by two carriers bargaining at arms length six years after the contract was signed and three years after Petricca stopped payment under the contract. Moreover, ACC bases its complaint on facts and circumstances existing not at the time the contract was executed, but rather two or more years later when service under the contract commenced and Yankee added additional customers to its digital microwave system.

15. The contract at issue was a private contract between two carriers. As such, it falls under the *Mobile-Sierra* doctrine,[43] as ACC recognized.[44] That doctrine holds that, where a regulatory statute "expressly recognizes that rates to particular customers may be set by individual contracts,"[45] a regulatory agency may modify the terms of the contract only where, after investigation, it determines that the terms of the contract would "adversely affect the public interest."[46] We explain our reasoning below.

16. It is well established that the *Mobile-Sierra* doctrine applies to contracts between communications common carriers. For example, in *Bell Telephone Company of Pennsylvania v. FCC*,[47] the Third Circuit held that AT&T could not abrogate a contract with Western Union, under which Western Union leased local distribution facilities, simply by filing superseding tariffs. In its opinion, the court reasoned that sections 201(b) and 211(a) of the Communications Act[48] clearly contemplate that carriers can enter into con-

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[35] ACC argued, in effect, that Yankee should have allocated costs to all known and projected users over the life of the system to derive "averaged costs." ACC Brief at 15.

[36] *Bureau Order*, 8 FCC Rcd at 88.

[37] *Id.*

[38] *Id.* at 88-89 (citing *Reservation Telephone Cooperative v. FCC*, 826 F.2d 1129, 1135-36 (D.C. Cir. 1987)).

[39] *Id.* at 89.

[40] *See* Application for Review at ii, iii.

[41] Opposition to Application for Review at ii (referring to *AT&T v. FCC* (FCC may not relieve certain carriers from the tariff filing requirements of Section 203 of the Act)).

[42] Application for Review at 8-11, 19-25.

[43] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ("*Mobile*"); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*").

[44] ACC Complaint ¶ 80 & n.140.

[45] *Mobile*, 350 U.S. at 338.

[46] *Sierra*, 350 U.S. at 355. *See also Mobile*, 350 U.S. at 344-45.

[47] 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975), *rehearing denied*, 423 U.S. 886 (1975).

[48] In relevant part, section 201(b) provides "that nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of services, if the Commission is of the opinion that such contract is not contrary to the public interest." 47 U.S.C. § 201(b)

Section 211(a) provides: "Every carrier subject to this Act shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers or with common carriers not

tracts for services with other carriers which would then be filed with the Commission, and that accordingly, the *Mobile-Sierra* doctrine applies to such carrier-to-carrier contracts.[49] Similarly, the District of Columbia Court of Appeals applied the *Mobile-Sierra* doctrine in *MCI Telecommunications Corp. v. FCC*,[50] where it reversed a Commission decision accepting a revised AT&T tariff on the ground that the revised tariff violated an underlying settlement agreement.[51] Furthermore, while the *Mobile-Sierra* 3doctrine has been most frequently applied where a supplier seeks unilaterally to raise rates, it also applies where, as here, a buyer subsequently demands lower rates when the market price falls after the contract has been signed.[52] Because both Petricca and Yankee were common carriers subject to the Communications Act, the contract they signed is therefore subject to the *Mobile-Sierra* doctrine.

17. The Supreme Court, in its *Mobile* and *Sierra* decisions, established a strict "public interest" standard that a regulatory agency must meet before it can modify the terms of a private contract that had been freely negotiated by the parties. In *Mobile*, for example, the Court held that natural gas companies, operating pursuant to contracts authorized under the Natural Gas Act, may not unilaterally abrogate or modify such contracts simply because it is in their private interest to do so. The Court stated that only "when their interests coincide with the *public interest*[53] would relief be available. Similarly, in *Sierra*, the Court stated that the mere fact that a rate produces less than a fair return is insufficient to modify the contract. Rather, "the rate [must be] so low as to adversely affect the *public interest* -- as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."[54] Accordingly, the Commission can abrogate that contract only if it finds that the terms of the contract "adversely affect the public interest."[55] Thus, any carrier challenging the terms of an intercarrier contract before the Commission faces a heavy burden.

18. We conclude that ACC's showing in this case falls well short of meeting this burden. It has made no showing that the terms of Petricca's contract with Yankee had any impact at all on the public interest.[56] On the contrary, ACC alleges only private injury, an injury that resulted solely from Petricca's improvident bargain.

19. Moreover, even if, contrary to *Mobile-Sierra*, we apply a lesser standard which considers the private interests of ACC, Petricca and Yankee, we still find that ACC has failed to demonstrate that the rates in the Petricca contract were unreasonable or unduly discriminatory.

20. ACC rests its Section 201(b) claims primarily on the allegation that Yankee used the Petricca Contract as a vehicle to finance its entry into the risky digital microwave business.[57] According to ACC, the contract rates were unlawful *per se* because Yankee used an individual case basis (ICB) pricing methodology that allocated 100% of its network costs to Petricca. ACC contends, in effect, that Yankee should have averaged its network costs over the life of the Petricca Contract and allocated those costs proportionally among all customers on its digital microwave network. ACC maintains that Yankee's failure to adjust the Petricca Contract rates after additional customers were added to the system rendered the Petricca Contract rates grossly excessive within the meaning of Section 201(b).[58]

21. Our review of the evidence and pleadings convinces us that ACC has failed to demonstrate that the Petricca Contract rates were unreasonable under the circumstances of this case. We agree with the Bureau's determination that the record supports findings that Petricca sought to freeze, for a six-year term, rates that were 40% lower than those it was then paying AT&T, and that the Petricca Contract was "entered into between two not-unequal bargaining parties in a competitive market where alternative service providers existed, and ... represented a good deal for Petricca based on the price it was then paying AT&T for microwave transmission service and its forecast of future price trends ...."[59]

22. The Bureau also properly determined that Yankee could reasonably develop its rates on an ICB basis. Yankee could not reasonably be expected to have developed at the time Yankee and Petricca entered into their agreement an average rate to be applied to all future customers. Yankee had no basis for estimating with any degree of certainty future demand for service along the routes Petricca speci-

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subject to the provisions of this Act, in relation to any traffic affected by the provisions of this Act to which it may be a party."

Finally, section 211(b) provides: "The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine."

[49] 503 F.2d at 1276-78. The court added that "[t]he legislative history, too, indicates that Congress intended *all* intercarrier contracts to be filed with the Commission." *Id.*, at 1278.

[50] 665 F.2d 1300 (D.C. Cir. 1981), *appeal after remand, RCA Global Communications, Inc. v. FCC*, 717 F.2d 1429 (D.C. Cir. 1983).

[51] In relevant part, the court stated: "A contract, such as the Agreement here, may refer to rates included in a tariff and yet continue to enjoy protection under *Sierra-Mobile* .... Contracts and tariffs are not always mutually exclusive, but may be used in concert to define the relationship of the parties. In such circumstances, the contract governs the legality of subsequent tariff filings." 665 F.2d at 1302. *See also Western Union Telegraph Co. v. FCC*, 815 F.2d 1495 (D.C. Cir. 1987) (*Mobile-Sierra* applied to intercarrier agreement which established compromise rates for the leasing of special access facilities and set specific procedures for changing those rates in the future); *MCI Telecommunications Corp. v. FCC*, 822 F.2d 80 (D.C. Cir. 1987) (*Mobile-Sierra* h)2applied to intercarrier agreement which, *inter alia*, governed the OCCs' use of AT&T's interstate private-line facilities).

[52] *See, e.g., San Diego Gas & Electric Co. v. FERC*, 904 F.2d 727 (D.C. Cir. 1990)

[53] 350 U.S. at 344 (emphasis added).

[54] 350 U.S. at 355 (emphasis added).

[55] *Sierra*, 350 U.S. at 354-55. *See also Western Union Telegraph Co. v. FCC*, 815 F.2d at 1501 n.2 ("[A]s the Supreme Court recognized in *Sierra*, complaints about existing rates do not concern the Commission unless the problems raised are sufficiently serious to adversely affect the public interest.").

[56] For example, ACC has not alleged that the Petricca contract resulted in the loss of service to customers or in increased prices.

[57] *See* Application for Review at 2-3; Yankee Reply Brief at 3.

[58] *See* Application for Review at 4-5; ACC Reply Brief at 6.

[59] *Bureau Order*, 8 FCC Rcd at 88 (citing Yankee Reply Brief at 3).

fied, nor could it foresee overall demand on its system once its core New York to Boston digital microwave system was completed. Under such circumstances, we have previously held that ICB rates are appropriate to insure cost recovery.[60] Thus, we find that the contract rates were not unreasonable under Section 201(b).

23. We also find no basis in the record to disturb the Bureau's determination that ACC failed to show that the Petricca Contract rates were not reasonably related to Yankee's actual costs of providing service to Petricca. Contrary to ACC's assertions, Yankee has provided extensive data in the record which establishes that it did not allocate 100 percent of its network costs to Petricca over the life of the contract. According to Yankee, it derived the Petricca Contract rate by first calculating the sum of: (1) the estimated total cost of constructing the facilities used to provide service to Petricca, (2) equipment, operational and maintenance costs, and (3) interest payments on loan obligations. Yankee's cost calculation included amounts to recover a return on the investment and to allow for unforeseen contingencies. Yankee then divided the total cost by the number of months in the contract to determine the Petricca Contract rate.[61] Data submitted by Yankee indicate that 50 percent of the operating expenses incurred by Yankee in providing service over routes Petricca shared with other customers was allocated to Petricca through 1991.[62] The record also shows that, taking into account the costs allocated to Petricca through 1991, Yankee's expected rate of return, assuming that payments were made as specified under the Petricca Contract, was approximately 13.4%. We find that this amount is not outside the zone of reasonableness under the facts and circumstances of this case.[63] We are satisfied that Yankee's rates to subsequent customers for service over the Petricca routes were reasonably based on a number of factors, including volume of service, length of contract term and the price and availability of alternative or competitive service over the same routes at the time those later agreements were negotiated.[64]

24. We next address whether the disparity in the Petricca Contract rates and the rates subsequently charged to Yankee's additional customers, including ACC, constitutes undue discrimination under the *Sierra* test or unjust or unreasonable discrimination under Section 202(a).[65] We find that it does not.

25. The crux of ACC's Section 202(a) discrimination claim is that the rates contained in the Petricca Contract are substantially higher than the rates Yankee later charged ACC and other customers for the same service. Yankee has proffered three primary reasons to explain the differentials between the rates charged ACC on the two routes it shared with Petricca (Pittsfield-Glastonbury and Pittsfield-Boston) and the Petricca Contract rates: (1) the facilities were constructed along these routes to provide service to Petricca, and Yankee's additional costs to provide service to ACC over the routes were incremental; (2) ACC ordered a larger volume of service which permitted certain economies of scale in operating costs and administrative overhead; and (3) because industry rates had declined substantially between the time the Petricca Contract was executed and the ACC-Yankee service agreements were signed, Yankee had to charge lower rates in order to attract ACC and other customers.[66]

26. In rejecting ACC's Section 202(a) claims, the Bureau examined the record evidence and found a neutral, rational basis for the rate disparity. Specifically, the Bureau found that Yankee and Petricca had entered into a presumptively lawful inter-carrier contract that required Yankee to construct the facilities needed to serve Petricca and that Yankee had steadily reduced its generally available rates from the time of the Petricca Contract to counter competing service offerings.[67]

27. In reviewing the record evidence describing the circumstances surrounding Yankee's service offerings in the 1985 to 1990 timeframe, we find ample support for the Bureau's finding that Petricca and Yankee's subsequent customers requested and obtained service under materially different conditions and, therefore, were not similarly situated for purposes of Section 202(a). Based on this evidence, we further find that the disparity in rates did not constitute undue discrimination under the *Sierra* test.

28. The record shows that the Petricca Contract rates were substantially below those Petricca was then paying AT&T for transmission services and that Petricca entered into the long-term contract in 1985 at least partly out of its desire for price stability.[68] Indeed, it is clear that the Petricca Contract was executed at a time when overall industry prices for interstate interexchange services were significantly higher than those agreed to by Petricca. Two or three years later, when the majority of Yankee's subsequent customers contracted for service, industry prices for

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[60] *See ICB Rate Order*, 4 FCC Rcd at 8642 (the use of ICB pricing as an interim transitional measure is not necessarily unlawful under Section 202(a) where carrier has insufficient experience with a service offering).

[61] *See* Yankee Brief at 24-27 and Tabs 4,5 and 9; Yankee Reply Brief at 6-7. The Commission has previously found it reasonable for a carrier to charge higher rates to its initial customer when the majority of the costs were associated with installation. *See* GTE Telephone Operating Companies, 5 FCC Rcd 5690 (1990).

[62] Yankee Brief at 24-27 and Tabs 4,5 and 9; Yankee Reply Brief at 6-7.

[63] *See* Yankee Reply Brief at 11-16, Tabs 4, 5 and 9. Yankee maintains that its cost estimates proved to be significantly understated as a result of substantial delays caused by Petricca's inability to secure a tower site for its Pittsfield location. Yankee's computations show that, if the amounts owed but not paid by Petricca under the Petricca Contract are excluded from the rate of return calculation, Yankee's actual rate of return on the Petricca service would be 2.2%. *See* Tabs 4 and 9.

[64] Yankee Reply Brief at 18-23; Yankee Brief at 12-21. There is ample support in the record for Yankee's claim that industry prices steadily declined between the time of the Petricca Contract and subsequent contracts. *See* Yankee Brief at 12-16 and Tabs 6 and 8; Yankee Reply Brief at 6-8 and Tab 5.

[65] *See Town of Norwood*, 587 F.2d at 1310. *See also Boroughs of Chambersburg et al. v. FERC*, 580 F.2d 573 (D.C. Cir. 1978)(discussing undue discrimination under *Mobile-Sierra*); *City of Frankfort v. FERC*, 678 F.2d 699 (7th Cir. 1982) (same).

[66] Yankee Reply Brief at 9-11; Yankee Brief at 12-16.

[67] *Bureau Order*, 8 FCC Rcd at 89 (citing *Reservation Telephone Cooperative v. FCC*, 826 F.2d 1129, 1135-36 (D.C. Cir. 1987) (court upheld Commission decision stating that AT&T was not obligated to renegotiate a private contract with another carrier even though the contract rates were higher than those of subsequent contracts)).

[68] Yankee Brief at 10-11.

interstate interexchange services had declined steadily and significantly. We note that the majority of the contracts Yankee executed with subsequent customers were for one year periods, which is consistent with our finding that prices for interstate, interexchange services were declining during this period. As indicated in our discussion of ACC's Section 201(b) claims, no showing has been made by ACC that Yankee's rates to its subsequent customers were not reasonably based on Yankee's costs of providing the facilities used by those customers as well as other factors such as volume of service, length of contract terms and the availability of alternative or competitive service over the same routes. Accordingly, we find that the rates agreed to in the Petricca contract were not unduly discriminatory or violative of Section 202(a).

B. Section 203

29. ACC now faults the Bureau Order for not requiring Yankee to file tariffs pursuant to Section 203 of the Act even though its complaint did not allege a violation of that section. The Bureau determined that, because Yankee was in the process of surrendering its licenses for digital microwave facilities, and it appeared that Yankee would soon discontinue offering any digital microwave service,[69] there was no basis upon which to order it to tariff such an offering.[70] To support its new Section 203 claims, it appears that ACC is pursuing in its application for review an entirely new theory not raised in its underlying complaint, *i.e.*, that Yankee should not be permitted to collect the Petricca Contract rates because Yankee violated Section 203(c) of the Act by not tariffing such rates. We reject ACC's new Section 203 claims because Section 1.115(c) of our rules specifically provides that "[no] application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."[71]

C. Section 415 Claims

30. In its complaint, ACC requested that the Commission order "Yankee to refund payments made by Petricca in excess of the prescribed rate."[72] Subsequently, after ACC apparently learned that claims for damages were barred under the statute of limitations in Section 415,[73] ACC's counsel wrote the Bureau that it was only seeking declaratory relief.[74] In a subsequent filing, however, ACC stated that, contrary to the Bureau's understanding, "ACC has not withdrawn the relief requested in paragraph 80 of its complaint."[75] Because of the confusion caused by ACC over whether it was seeking a refund from Yankee, the Bureau, in its order, appropriately held that, to the extent that either ACC or Petricca was seeking a refund or damages based on alleged overcharges in thePetricca contract, such claims were barred by Section 415. Contrary to ACC's suggestion, the Bureau did not find that ACC's entire complaint, including its requests for declaratory rulings, is barred by the statute of limitations in Section 415 of the Act. Nor did the Bureau find that affirmative defenses in Yankee's state court action or any counterclaim by ACC for recoupment in that court action are barred. Rather, because ACC had sought a refund as part of the relief requested in its complaint,[76] and because the time for Petricca or ACC to file a complaint for damages at this Commission had lapsed, the Bureau Order correctly held that, to the extent that ACC's complaint was in substance a request for a Commission ruling that damages were due Petricca or ACC, Section 415(b) of the Act barred such relief.[77] The Bureau Order did not rely on the statute of limitations in concluding that ACC's complaint as a whole should be denied.

D. Burden of Proof

31. We reject ACC's claims that the Bureau incorrectly placed the burden on ACC to substantiate its allegations that the Petricca Contract rates were unlawful under Sections 201(b) and 202(a) of the Act. It is well-established that, in a formal complaint proceeding pursuant to Section 208 of the Act,[78] the complainant has the burden of proof.[79]

E. Miscellaneous

32. We have examined other arguments of ACC and find them also without merit. Some are based on erroneous premises (e.g., that the Bureau approved ICB rates for an unreasonably long period;[80] that Petricca and other Yankee customers were similarly situated during the relevant contract periods;[81] and that the Bureau "rushed to issue its decision before the [*AT&T v. FCC*] court issued its man-

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[69] In Letters from A. Kimberly Matthews to Donna R. Searcy dated June 19, 1991, June 25, 1992, and December 11, 1992, Yankee voluntarily surrendered its licenses for digital microwave service over the Petricca routes.

[70] *Bureau Order*, 8 FCC Rcd at 87 (citing Yankee Brief at 3, n.4 and Tab 1 at 4). The Bureau stated, however, that if Yankee had chosen to continue offering interstate digital services, Yankee would be subject to Section 203 of the Act, applicable Commission rules and orders in implementation thereof and any further orders of the Commission with respect to nondominant carriers adopted pursuant to *AT&T v. FCC*, *supra*. *Bureau Order*, 8 FCC Rcd at 87.

[71] 47 C.F.R. § 1.115(c).

[72] ACC Complaint ¶ 80.

[73] 47 U.S.C. § 415.

[74] Letter of Russell D. Lukas to Gregory A. Weiss, File No. E-91-94 (Dec. 9, 1991). *See also* ACC Application for Review at 11 n.32.

[75] ACC Opposition to Motion to Hold in Abeyance (filed January 23, 1992) at n.1.

[76] ACC Complaint, ¶ 80.

[77] *Bureau Order*, 8 FCC Rcd at 87.

[78] 47 U.S.C. § 208.

[79] *See, e.g.*, Amendment of Rules Concerning Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, 8 FCC Rcd 2614, 2616-17 (1993); Connecticut Office of Consumer Counsel v. AT&T Communications, 4 FCC Rcd 8130, 8133 (1989), *aff'd sub nom.* Connecticut Office of Consumer Counsel v. FCC, 915 F.2d 75 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991).

[80] Although the Bureau did not grant Yankee's request for an affirmative finding that its rates for the period February 1987 - September 1988 were just and reasonable (*see Bureau Order*, 8 FCC Rcd at 89), the Bureau found that ACC had not shown that the ICB rates in the Petricca Contract were inappropriate as a transition mechanism under the circumstances. *Id.* at 88.

[81] In regard to the requirement under Section 202(a) of the Act that a carrier make its rates generally available to all similarly situated customers, the Bureau found that no Section 202(a) violation had occurred. *Id.* at 89.

date").[82] Others are based on unsupported assumptions (e.g., that differences in the quality and other characteristics of Yankee's digital microwave services, compared to AT&T's analog services, were immaterial to Petricca).[83] Still others assumed findings that the state court may or may not make (e.g., that Yankee breached its contract with Petricca when it elected not to tariff its interstate rates at the FCC).

33. Finally, on April 29, 1993, well after the close of the pleading cycle in this proceeding, ACC filed a "Motion for Leave to File Supplemental Memorandum" (Motion), attaching a "Memorandum of Supplemental Points and Authorities in Support of Application for Review" (Supplemental Memorandum). Although ACC's Motion purports to be filed pursuant to Section 1.720(g) of our rules, ACC's reliance on Section 1.720(g) is misplaced. That section contemplates filings to alert the Commission of changes in information or the status of relevant legal authorities, not filings expanding or reinforcing a party's theory of its case. Therefore, we deny ACC's motion as an unauthorized pleading.

V. CONCLUSION

34. We conclude that neither the facts of this case nor the applicable law justify reversing the Bureau Order to grant the relief that ACC seeks. Under the *Mobile-Sierra* doctrine, we find that ACC has failed to demonstrate that it would be in the public interest to abrogate a contract which was freely entered into by two carriers of not unequal bargaining power.

VI. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that except as otherwise indicated herein, the "Motion for Leave to File Supplemental Memorandum" filed by ACC Long Distance Corp. on April 29, 1993, IS DENIED.

36. IT IS FURTHER ORDERED that the material findings and conclusions of the Bureau Order, as updated herein, ARE AFFIRMED.

37. IT IS FURTHER ORDERED that the Application for Review filed by ACC on January 26, 1993 IS DENIED.

38. IT IS FURTHER ORDERED that ACC's Motion for Expedited Review IS DISMISSED as moot.

39. IT IS FURTHER ORDERED that the "Motion for Leave to File Supplement to Motion for Expedited Review," filed by ACC on July 12, 1993, IS DISMISSED as moot.

40. IT IS FURTHER ORDERED that the Chief of the Common Carrier Bureau's Formal Complaints and Investigations Branch shall send a copy of this Order to the Honorable Daniel A. Ford, Justice of the Superior Court for Berkshire County, Massachusetts.

41. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[82] The *Bureau Order* was adopted on December 16, 1992. The court's mandate issued on March 9, 1993.
[83] Digital microwave service is generally considered more desirable than analog service.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of

ECTOR CABLE T.V. File No. CSR-4275

For Waiver of Section 76.501(d)
of the Commission's Rules.
47 C.F.R. § 76.501(d)

MEMORANDUM OPINION AND ORDER

Adopted: December 21, 1994; Released: January 19, 1995

By the Chief, Cable Services Bureau:

1. On June 24, 1994, Ector Cable T.V. ("Ector"), filed a petition for special relief, requesting a waiver of the Commission's rules, to permit the sale of two satellite master antenna television ("SMATV") systems owned and operated by Ector to Post-Newsweek Cable, Inc. ("PNC").[1] Ector supplemented its request on October 28, 1994. Ector's SMATV systems serve Sunset Apartments and Trestles Apartments in the city of Odessa in Ector County, Texas. PNC provides franchised cable service in the city of Odessa. Ector's waiver request is unopposed.

2. *Legal and Regulatory Framework.* Sections 76.501(d) and (e) of the Commission's Rules[2] implement Section 613(a)(2) of the Communication's Act.[3] That section of the Communications Act prohibits a cable operator from offering SMATV service separate and apart from any franchised cable service in any portion of the franchise area served by that cable operator's cable system. In the *First Report and Order* adopting rules implementing the statutory cross-ownership provisions, the Commission determined that Congress intended a narrow restriction with respect to SMATV-cable cross-ownership.[4] Accordingly, the Commission adopted rules that prohibit franchised cable operators from acquiring existing SMATV facilities within the franchised cable operators' actual service areas for the purpose of providing cable service.[5]

3. However, as the Commission observed, the statutory provision does not prohibit all SMATV-cable cross-ownerships within a cable operator's franchise area or even within its actual service area.[6] A cable operator is permitted to construct a stand-alone or integrated SMATV system within its actual service area, provided that service from that facility is offered in accordance with the terms and conditions of the cable franchise agreement.[7] In addition, in the unserved portions of the franchise area, a cable operator is permitted to build or acquire a stand-alone SMATV system, provided such cable-owned SMATV system is operated in accordance with the terms and conditions of the cable franchise agreement.[8]

4. *Factual Background.* According to the information provided inthe petition and supplement, Lennel H. (Herman) Kincaid, the sole owner of Ector, operates two SMATV systems located in the City of Odessa in Ector County, Texas. Ector serves 76 subscribers in the Trestles apartment complex, a 280-unit complex located on the eastern edge of Odessa, and 71 subscribers in the Sunset apartment complex, a 264-unit complex located on the north edge of Odessa.[9] Ector states that the SMATV systems were installed in the complexes in the early 1980's when new construction outpaced PNC's ability to extend service to the outskirts of town.[10] Ector represents that PNC's coaxial cable lines do not pass either the Trestles or the Sunset complex.[11]

5. Ector represents that Mr. Kincaid acquired the two SMATV systems in April of 1993 as a result of the former owner's default on a loan guaranteed by Mr. Kincaid.[12] Ector represents that at the time it acquired the SMATV systems, PNC expressed an interest in purchasing the systems, but was unable to obtain access to the buildings from the complex owners.[13] According to Ector, both complexes have new owners, each of whom has expressed a preference that PNC, rather than Ector, provide multichannel video programming service to their tenants.[14] Ector states that PNC has indicted its continuing interest in purchasing the SMATV systems, and that the apartment owners have indicated their interest in providing the requisite access to PNC.[15]

6. Ector states that since its initial acquisition of the SMATV systems, it has attempted to locate an appropriate buyer.[16] Ector represents that it has run advertisements in newspapers in Odessa and Midland, Texas, written letters to

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[1] Ector states that it seeks a waiver of the three-year holding period requirement of Section 76.502 of the Commission's rules, 47 C.F.R. § 76.502, implementing Section 617 of the Communications Act of 1934, as amended (the "Communications Act"), 47 U.S.C. § 537. However, upon review of the request, we have determined that the relief sought is actually a wavier of the Commission's SMATV-cable cross-ownership rules, 47 C.F.R. § 76.501(d)-(e), which implement Section 613 of the Communications Act, 47 U.S.C. § 533(a)(2). Consequently, we will, *sua sponte*, treat the filing as a request for wavier of the SMATV-cable cross-ownership rules.

[2] 47 C.F.R. § 76.501(d)-(e). These rules are referred to as the SMATV-cable cross-ownership rules.

[3] 47 U.S.C. § 533(a)(2).

[4] *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 (Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions)* MM Docket No. 92-264, *First Report and Order* (hereinafter *First Report and Order*), ¶ 6, 8 FCC Rcd 6828, 6829 (1993), *recon. pending.*

[5] *Id.* ¶ ¶ 6, 123, 8 FCC Rcd at 6829, 6846.

[6] *Id.* ¶ 119, 8 FCC Rcd at 6845.

[7] *Id.* ¶ ¶ 6, 122, 8 FCC Rcd at 6829, 6845-46.

[8] *Id.* ¶ ¶ 6, 127, 8 FCC Rcd at 6829, 6846.

[9] Waiver Supplement at 1-2.

[10] *Id.*

[11] *Id.*

[12] Waiver Request at 1-2.

[13] Waiver Request at 2.

[14] *Id.*

[15] *Id.*

[16] Waiver Request at 2.

all local cable operators, and contacted several cable brokers and wireless companies, but has been unsuccessful in attracting a prospective purchaser other than PNC.[17]

7. *Ector's Arguments.* Ector asserts that it never intended to hold the SMATV systems as an investment, and that it has endeavored to sell the systems since it "involuntarily" became the owner of the systems.[18] Ector further asserts that the tenants of the buildings will be better served by PNC than by Ector. In support, Ector states that it only offers one level of programming service comprised of eleven or twelve channels at a monthly rate of $15.50, compared with PNC's forty-nine channels and three levels of monthly service offered at rates of twelve channels for $6.19, forty-two channels for $21.66, and seven premium channels at varying rates.[19] Ector contends that updating the SMATV systems is not a viable alternative because upgrading would require: (1) the expenditure of $75,000 to increase the systems' capacity by just eight channels; (2) the expenditure of an additional $35,000 to $45,000 on each system to add a single pay-per-view channel; and (3) an increase in subscriber rates to $22.00 per month just for cost recovery.[20] Finally, Ector notes that the local newspaper lists PNC's channel line-up, but not Ector's, rendering the systems' subscribers unable to use the local newspaper to select viewing choices.[21]

8. *Discussion.* Ector currently operates its two SMATV systems in Odessa, Texas, without competition from any other multichannel video distributor. Although the two systems are in PNC's franchise area, it appears that they are not served by PNC. The Commission's rules permit a cable operator to construct or acquire SMATV facilities within its franchise area in areas not served by the cable system.[22] Indeed, the Commission expressly stated that "if a cable operator has not wired its entire franchise area, the cross-ownership ban does not prevent the operator from building or acquiring a stand-alone SMATV system."[23] The Commission's rules state that the "term area served by a cable system shall mean any area actually passed by a cable system and which can be connected for a standard connection fee."[24]

9. We need not decide the precise distance that must exist between a SMATV system and a franchised cable operator's cable plant in order to resolve Ector's petition. Ector represents in its unopposed petition that its two SMATV systems are located in apartment complexes situated on the edges of Odessa and that PNC does not pass either complex. We conclude that Ector has established that the two SMATV systems are in areas of the franchise which are not served by the franchised cable operator. Accordingly, the cross-ownership restriction does not preclude their acquisition by PNC.

10. For the reasons specified above, we conclude that the proposed acquisition of Ector by PNC falls within the parameters of Section 76.501(e)(2) of our rules. We therefore grant Ector's request, conditioned upon PNC's operation of the acquired SMATV systems pursuant to all of the terms and conditions of PNC's franchise agreement with the city of Odessa, Texas.

11. In view of the foregoing, IT IS ORDERED that, pursuant to 47 C.F.R. § 0.321, and in accordance with 47 C.F.R. § 76.501(e)(2), we hereby GRANT Ector Cable TV's request for a waiver of the SMATV-cable cross-ownership rules, conditioned upon Post-Newsweek Cable, Inc.'s operation of the acquired SMATV systems pursuant to all of the terms and conditions of its franchise agreement with the city of Odessa, Texas.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[17] *Id.*; Waiver Supplement at 1.
[18] Waiver Request at 3.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] 47 C.F.R. § 76.501(e)(2). *See also, Clearview Cable TV, Inc., (Application for Waiver of Section 76.501(d))*, DA 94-1172, 9 FCC Rcd _____ (CSB 1994).
[23] *First Report and Order* ¶ 127, 8 FCC Rcd at 6846.
[24] 47 C.F.R. § 76.501(e)(2)(ii). The term "standard connection fee" is not defined in the statute or in the Commission's rules. However, in *Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of h)1992 (Consumer Protection and Customer Service)*, (MM Docket 92-263), *First Report and Order*, 8 FCC Rcd 2892, 2905 (1993), the Commission defined standard installation in the context of the customer service standards as an installation that is located up to 125 feet from the existing distribution system. 47 C.F.R. § 76.309(c)(2)(i).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-504

In re Applications of

ANCHOR BROADCASTING LIMITED PARTNERSHIP	File No. BPH-860917MD
GALAXY COMMUNICATIONS, INC.	File No. BPH-860918NY
SUSAN M. BECHTEL	File No. BPH-860918OV

For a Construction Permit for a new FM Station on Channel 250A in Selbyville, Delaware

MEMORANDUM OPINION AND ORDER

Adopted: December 22, 1994; Released: January 19, 1995

By the Commission:

I. INTRODUCTION

1. This order denies a Joint Motion to Dismiss Application of Galaxy Communications, Inc. or to Grant Similar Relief, filed July 7, 1994, by Anchor Broadcasting Limited Partnership and Susan M. Bechtel.[1] Anchor and Bechtel contend that the denial of Galaxy's application has become final and that Galaxy should therefore be dismissed as a party to this proceeding.

II. BACKGROUND

2. In this proceeding, the Commission granted Anchor's application for a new FM radio station in Selbyville, Delaware, and denied the mutually exclusive applications of Galaxy, and Bechtel. *Anchor Broadcasting Limited Partnership*, 6 FCC Rcd 721 (1991). We preferred Anchor and Galaxy over Bechtel because, unlike Bechtel, they proposed to integrate their ownership into management. We preferred Anchor over Galaxy because Anchor's integration was enhanced by minority ownership and proposed local residence. We found these advantages more significant than Galaxy's very brief local residence and civic participation and Galaxy's slight preference for comparative coverage. 6 FCC Rcd at 724 ¶ 16.

3. Both Galaxy and Bechtel appealed the denial of their applications to the United States Court of Appeals for the District of Columbia Circuit. On January 31, 1992, the court upheld the Commission's denial of Galaxy's application. It rejected Galaxy's argument that Anchor's integration proposal was unreliable and found that Galaxy's challenge to the constitutionality of Anchor's minority credit had not been timely raised. *Bechtel v. FCC*, 957 F.2d 873, 877-79 (D.C. Cir. 1992). However, the court remanded the proceeding to the Commission to further consider Bechtel's argument that integration should no longer be used as a comparative criterion. 957 F.2d at 879-82.

4. After further consideration on remand, the Commission, on July 21, 1992, issued an order providing further justification for the use of the integration criterion and reaffirming its grant to Anchor. *Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566 (1992).

5. During the pendency of the remanded proceeding, Galaxy sought certiorari based on its challenge to Anchor's integration proposal and the constitutionality of Anchor's minority credit. The Supreme Court denied certiorari on October 5, 1992. *Galaxy Communications, Inc. v. FCC*, 113 S. Ct. 57 (1992).

6. Subsequently, on March 10, 1993, the Commission partially granted a petition for reconsideration filed by Galaxy before the denial of certiorari, modified its order on remand, and offered additional justification for the continued use of the integration criterion. *Anchor Broadcasting Limited Partnership*, 8 FCC Rcd 1674 (1993). In this regard, the Commission declined to summarily dismiss Galaxy's petition for reconsideration in response to arguments that, since certiorari had been denied, Galaxy was no longer a party to the proceeding. The Commission noted that the Court of Appeals had rejected Bechtel's motion to dismiss Galaxy as a party to Bechtel's pending appeal of the first order on remand. 8 FCC Rcd at 1675 ¶ ¶ 7-9. *See Bechtel v. FCC*, No. 92-1378 (D.C. Cir. Feb. 19, 1993) (order). The Commission found it appropriate to defer to the court's ruling.

7. Bechtel and Galaxy appealed the Commission's reaffirmation of its grant to Anchor. On December 17, 1993, the court reversed and remanded the Commission's action. *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). The court held that the integration criterion was arbitrary and capricious and therefore unlawful. In remanding the proceeding, the court declined to rule whether Galaxy's application was entitled to further consideration, leaving that question to the Commission "in the first instance." 10 F.3d at 887.

8. On February 25, 1994, the Commission held all pending comparative proceedings in abeyance while it considered what action would be appropriate in light of the court's invalidation of the integration criterion. *Public Notice*, 9 FCC Rcd 1055 (1994). During the freeze, the Commission has permitted the parties to negotiate and submit settlement agreements for approval.

[1] Also before the Commission are: (1) an opposition, filed July 28, 1994, by Galaxy Communications, Inc.; and (2) a reply, filed August 9, 1994, by Anchor and Bechtel.

III. MOTION

9. Bechtel and Anchor assert that the Supreme Court's denial of certiorari exhausted Galaxy's appeals and that the denial of its application is now final.[2] Movants argue that Galaxy's original appeal to the D.C. Circuit did not challenge the integration criterion, the basis on which the court remanded the proceeding, and that Galaxy did not attempt to raise this issue until after the court granted Bechtel's appeal. Thus, movants claim that Galaxy's case terminated with the final rejection by the Supreme Court of the issues that Galaxy did raise. Movants further claim that there is no basis to permit Galaxy to benefit from the consideration of issues that Galaxy did not raise in a timely manner.

10. Galaxy responds that, when the court granted Bechtel's original appeal, it remanded the consolidated proceeding, including Galaxy's application, for further consideration. Galaxy also observes that in opposing Galaxy's petition for certiorari, the government characterized the status of the case as "interlocutory" because the remand might result in grant to a "licensee other than Anchor in any case." Brief for the United States and the Federal Communications Commission, No. 91-1744 at 14. Galaxy contends that this reflects recognition that Galaxy's application was entitled to further consideration in the remanded proceeding.

11. Galaxy disputes the assertion that it did not question the integration criterion until after the court's first remand and contends that in challenging Anchor's integration proposal, it made arguments which the court's remand order "echoes." Opposition to Joint Motion to Dismiss at 6. Galaxy asserts that it has continued to actively participate in this proceeding after the original remand.

12. Anchor and Bechtel reply that Galaxy disagreed with the government's contention before the Supreme Court that Galaxy's petition for certiorari was interlocutory. In any event, they assert that the Supreme Court gave no indication that it found the matter interlocutory and had denied certiorari on that basis. Additionally, Anchor and Bechtel dispute that Galaxy challenged the integration criterion in a timely manner.

IV. DISCUSSION

13. Although we will deny the joint motion, we acknowledge that the arguments made by Bechtel and Anchor have considerable force. Galaxy clearly lost its appeal of the denial of its application and was unsuccessful in persuading the Supreme Court to review the adverse decision of the Court of Appeals. Ordinarily, the denial of Galaxy's application would become final in this situation. Moreover, viewed realistically, the grounds for Galaxy's appeal of the denial of its application were distinct from those of Bechtel. As we indicated in our prior order, Galaxy's chances for success appear to have depended crucially on either invalidating Anchor's specific integration proposal (while receiving credit for its own) or eliminating Anchor's decisive advantage for minority ownership. 8 FCC Rcd at 1675 ¶ 9. However, Galaxy's arguments about Anchor's integration proposal have been rejected and, consistent with the mandate of Congress, we do not intend to reduce the weight due Anchor's minority ownership regardless of the fate of the integration criterion. *See Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, 2667 ¶ 23 (1992). Thus, final denial of Galaxy's appeal by the courts appears to have undercut the viability of its application, and the elimination of integration per se does not appear to assist Galaxy.

14. We are troubled, however, by the seeming inconsistency between this analysis and the statement made to the Supreme Court that this case was "interlocutory," which could be read to mean that the government was representing to the Supreme Court that Galaxy would be entitled to participate in this remand proceeding. We also take note of the Court of Appeals' denial of Bechtel's earlier attempt to terminate Galaxy's participation in this proceeding. Accordingly, although the Court of Appeals left it to us "in the first instance" to rule on Galaxy's status, we decline to issue the order requested.

V. ORDER

15. ACCORDINGLY, IT IS ORDERED, That the Joint Motion to Dismiss Application of Galaxy Communications, Inc. or to Grant Other Similar Relief, filed July 7, 1994, by Anchor Broadcasting Limited Partnership and Susan M. Bechtel IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[2] Anchor and Bechtel state that they are engaged in settlement negotiations and that Galaxy's continued participation in this proceeding has made it more difficult to reach a settlement. Galaxy answers that the interest of the other parties in reaching a settlement is no reason to abridge its right to participate in this proceeding.s

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-64

In the Matter of

Regulations Concerning Indecent
Communications by Telephone

ORDER ON PARTIAL RECONSIDERATION

Adopted: December 23, 1994; Released: January 19, 1995

By the Commission:

I. INTRODUCTION

1. The National Telephone Cooperative Association (NTCA) has filed a Petition for Partial Reconsideration and Clarification (Petition) of the regulations adopted in the *Report and Order in re Regulations Concerning Indecent Communications by Telephone*, CC Docket No. 90-64, 5 FCC Rcd 4926 (1990) (*Report and Order*).[1] Those rules establish defenses to prosecution for indecent commercial telephone communications under Section 223(b) of the Communications Act of 1934, as amended[2] (Act). NTCA seeks clarification that carriers that use the billing services of local exchange carriers (LECs) must notify LECs when billing is for an adult message service provider. NCTA also seeks clarification that billing LECs are subject to the provisions of Section 223 and our implementing rules only if they have been notified in writing of the adult content of the services. We grant NTCA's Petition.

II. BACKGROUND

2. In November 1989, Congress amended Section 223(b) of the Act to regulate indecent commercial telephone communications.[3] Asamended, Section 223 imposes liability on adult message providers and carriers for knowingly making or permitting any indecent communication for commercial purposes to any person under 18 years of age. That section imposes similar liability when an indecent commercial communication is made to any person who is 18 years of age or older, unless the individual has given prior consent.[4] Section 223 also establishes defenses to prosecution and empowers the Commission to promulgate additional defenses by regulation.[5]

3. In 1990, the Commission issued a *Notice of Proposed Rulemaking* to implement the requirements of Section 223 of the Act, as amended.[6] The Commission subsequently adopted rules that, among other things, established defenses to prosecution for violation of Section 223. The rules provide, among other things, that a party is not subject to prosecution under Section 223(b)(2) if the potential defendant:

> 1) notifies carriers that remit to the defendant an identifiable charge collected from subscribers that the defendant is providing indecent telephone messages for commercial purposes,[7] and
>
> 2) in instances where the defendant subscribes to mass announcement services[8] tariffed at the Commission, the defendant submits a written request to the carriers providing the service that calls to the message service be identified as calls to an adult message service on the bills rendered by the carriers on behalf of the message service provider.[9]

In addition, when technically feasible, common carriers areprohibited from providing access to indecent communications for commercial purposes from the telephone of any subscriber who has not previously requested, in writing, that the carrier provide access to such communications.[10] This prohibition, however, applies only to carriers that collect from subscribers an identifiable charge for such indecent communication which they remit, in whole or in part, to the providers of such communication.[11] In its petition, NTCA seeks clarification of these requirements as they apply to LECs.[12]

III. PETITION AND COMMENTS

4. NTCA is an association of LECs that provide exchange access service to interexchange carriers (IXCs). The IXCs, in turn, provide transmission service to information service providers, including adult message services. The adult messages are transmitted to end users through the LEC's local network, but the LECs have no contractual relationship with the information providers and, according to NTCA,

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[1] Pacific Bell and Nevada Bell (Pacific) and the United States Telephone Association (USTA) filed supporting comments.

[2] 47 U.S.C. § 223(b)

[3] *See* P.L. 100-297, 102 Stat. 424, April 28, 1988, *amended* by P.L. 101-166, 103 Stat. 1159, November 21, 1989. Congress initially sought to prohibit indecent as well as obscene interstate commercial telephone communications directed to any person regardless of age. The Supreme Court in *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 109 S. Ct. 2829 (1989) upheld the ban on obscene telephone transmission, but struck down the total ban on indecent communications. In response to the *Sable* decision, Section 223(b) was amended to regulate rather than prohibit indecent telephonic communications for commercial purposes.

[4] 47 U.S.C. § 223(b)(2).

[5] 47 U.S.C. § 223(b)(3).

[6] *Notice of Proposed Rulemaking in Regulations Concerning Indecent Communications by Telephone*, Gen. Docket No. 90-64, FCC Rcd 1011 (1990).

[7] 47 C.F.R. § 64.201(a)(1).

[8] Mass announcement services are services that transmit messages simultaneously to multiple recipients.

[9] 47 C.F.R. § 64.201(a)(5).

[10] 47 U.S.C. Section 223(c)(1).

[11] 47 C.F.R. § 64.201(b). *See* 47 U.S.C. § 223(c).

[12] The Ninth Circuit rejected arguments that Section 223(b) and the Commission's implementing regulations are unconstitutional. *See Information Providers' Coalition for Defense of The First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991).

have no way of identifying the information providers that sell adult messages. The defenses to prosecution established by the Commission require an adult message provider to notify the carrier (often the IXC) with whom it contracts for mass announcement service, that the calls the carrier receives must be labeled as calls to an adult telephone message service on the caller's bill. LECs must separately label adult message calls on the bills they render for the IXCs.

5. NTCA asks the Commission to clarify that Section 64.201 of its rules requires IXCs and other carriers that contract with adult message services to notify the billing LECs that calls to such message service providers should be identified as adult messages on bills rendered by the LECs on behalf of IXCs and other carriers. LECs who provide billing and collection services for other carriers normally have no contractual relationship with adult message providers who may be the ultimate beneficiaries of these billing and collection services. NTCA, therefore, also asks the Commission to clarify that Section 64.201 requires such LECs to label separately adult message service calls on bills and deny unrequested subscriber access to adult message services only in those instances where the LECs have received written notice of the adult content of the services.

6. Pacific and USTA filed comments in support of NTCA's Petition. Pacific states that, like the smaller LECs that are members ofNTCA, it does not interact with IXC information service customers and is unable to monitor the content of their communications. Therefore, Pacific must be informed when it bills for adult message services on behalf of the IXCs. USTA claims that Congress did not intend the prohibition against providing subscriber access to adult message services to apply to LECs that have no contractual relationship with the original adult message service provider.

IV. DISCUSSION

7. Section 64.201 of the Commission's rules sets forth defenses to prosecution for provision of indecent communications in violation of Section 223(b)(2) of the Act, 47 U.S.C. § 223(b)(2).[13] The statute includes within the scope of the term "defendant" any potential violator of Section 223(b)(2). Further, Section 223(b)(2)(B) of the Act makes it clear that carriers that transmit adult message services are potential defendants. Therefore, to preserve a defense under Section 64.201, intervening carriers, such as IXCs, as well as originating adult message service providers, are required to notify "the common carrier identified in section 223(c)(1)[of the Act]"[14] of the existence of any customer that provides an adult message service. Furthermore, intervening carriers, such as IXCs, that are involved in the provision of adult message services to the local exchange are clearly participants in the collection and remission of identifiable charges for such services under Section 223(c)(1) of the Act. Therefore, we clarify and confirm that Section 64.201(a) of the Commission's rules requires originating adult message providers to notify their carrier of the nature of their messages and requires that carrier, in turn, to notify the billing LEC so that the LEC may comply with Section 223 of the Act and the Commission's implementing regulations.

8. NTCA further asks the Commission to clarify that, to be subject to the provisions of Section 223(c)(1), LECs must have written notice of the adult content of a message from the IXCs for which they perform billing and collection services. Section 223(c)(2) of the Act provides that no cause of action may be brought in any court or administrative agency against any common carrier on account of "any access permitted in good faith reliance upon the lack of any representation by a provider of communications that communications provided by that provider are communications specified in subsection (b)."[15] In light of this provision and in the interests of promoting rigorous, objective enforcement of the Act, we clarify that failure of intervening carriers, such as IXCs,[16] to notify a LEC in writing of the adult nature of transmitted messages where such notification is required by Section 64.201(a) of our Rules, as explained in the preceding paragraph, precludes prosecution of the LEC for violation of Sections 223(b)(2) and 223 (c)(1) of the Act.

9. We do not agree with USTA's contention that Congress did not intend its prohibition against providing access to apply to LECs that do not have a contractual relationship with the originator of the adult message service. Since adult message service providers routinely contract with IXCs that access local subscribers through LECs, such an intention on the part of Congress would have robbed Section 223(b)(2) of most of its force. Given the objective expressed in the record that the proposed amendment would "result in ending the availability of dial-a-porn to children, once and for all,"[17] this interpretation is in keeping with Congressional intent, our rules and the record in this proceeding.

V. CONCLUSION

10. To the extent discussed in this Order on Partial Reconsideration we grant clarification of the regulations adopted in the *Report and Order in re Regulations Concerning Indecent Communications by Telephone*, CC Docket No. 90-64, 5 FCC Rcd 4926 (1990), as requested by the NTCA in its Petition. Specifically, we clarify that Section 64.201 requires IXCs and other carriers that contract with adult message service providers to notify the LECs providing subscriber billing for calls to these services that such calls

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[13] 47 C.F.R. § 64.201(a).

[14] 47 C.F.R. § 64.201(a)(1). Section 223(c)(1) of the Act, 47 U.S.C. § 223(c)(1), states:

> A common carrier within the District of Columbia or within any state or in interstate or foreign commerce shall not to the extent technically feasible, provide access to a communication specified in subsection (b) from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

[15] 47 U.S.C. § 223(c)(2).

[16] We interpret "provider of communications" to encompass intervening carriers, such as IXCs, as well as originating adult message services. This interpretation, in our view, is consistent with Congress's goal of providing broad protection to the public.

[17] 135 Cong. Rec. H8886 (November 17, 1989) (statement of Rep. Rinaldo).

should be separately labeled as calls to adult message services on the bill. We further clarify that failure of such IXCs and other carriers to meet this requirement precludes prosecution of the LECs providing such subscriber billing for violation of Section 64.201 of our Rules or Section 223(b)(2) of the Act.

VI. ORDERING CLAUSE

11. Accordingly, pursuant to Sections 1, 4(i), 201-205, 223 and 303(r) of the Communications Act of 1934, as amended 47 U.S.C. §§ 151, 154(i), 201-205, 223, and 303(r), and Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, IT IS ORDERED that National Telephone Cooperative Association's Petition for Partial Reconsideration and Clarification is GRANTED as set forth above.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Complaint of

FOUCE AMUSEMENT ENTERPRISES, INC.
Licensee of Television Station KRCA,
Riverside, California

CSR-4300-M

For Carriage on Paragon Cable System
Serving Garden Grove, Westminster, and
Huntington Beach, California

and

In Re Petition of

PARAGON CABLE

CSR-4368-A

Modification of KRCA ADI Market
For Must Carry Purposes

Cypress, CA (CA No Code)
Fountain Valley, CA (CA0752)
Garden Grove, CA (CA0943)
Huntington Beach, CA (CA0751)
Los Alamitos, CA (CA0944)
Midway City, CA (CA0931)
Rossmoor, CA (CA0845)
Stanton, CA (CA0932)
Westminster, CA (CA0750)

MEMORANDUM OPINION AND ORDER

Adopted: January 9, 1995; Released: January 19, 1995

By the Cable Services Bureau

1. Before the Commission are two interrelated pleadings involving Fouce Amusement Enterprises, Inc. ("Fouce"), licensee of television station KRCA(TV), Channel 62 (Independent), Riverside, California and Paragon Cable ("Paragon"). The first pleading is a Complaint filed by Fouce (CSR- 4300-M) on August 2, 1994, seeking to enforce the Commission's must carry rules, 47 C.F.R. Section 76.55 *et. seq.*, and to require the proper carriage of KRCA by Paragon's cable system serving the principal communities of Garden Grove, Westminster and Huntington Beach, California (the "System"). The second pleading is a Petition for Special Relief filed by Paragon (CSR- 4368-A) on September 16, 1994, seeking modification of the television market of KRCA, for must carry purposes, to exclude the communities served by Paragon's Orange County cable system (the "Orange County System"). We will resolve Paragon's market modification Petition first, and then we will address Fouce's must carry complaint.

MARKET MODIFICATION

BACKGROUND

2. Pursuant to §4 of the Cable Television Consumer Protection and Competition Act of 1992 ["1992 Cable Act"][1] and implementing rules adopted by the Commission in its *Report and Order in MM Docket No. 92-259*,[2] a commercial television broadcast station is entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.[3] An ADI is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.[4]

3. This section of the 1992 Cable Act also provides that the Commission may:

> with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.

In considering such requests, the 1992 Cable Act provides that:

> the Commission shall afford particular attention to the value of localism by taking into account such factors as--
>
> (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
>
> (II) whether the television station provides coverage or other local service to such community;

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] 8 FCC Rcd 2965, 2976-2977 (1993).

[3] Section 4 of the 1992 Cable Act specifies that a commercial broadcasting station's market shall be determined in the manner provided in §73.3555(d)(3)(i) of the Commission's Rules, as in effect on May 1, 1991. This section of the rules, now redesignated §73.3555(e)(3)(i), refers to Arbitron's ADI for purposes of the broadcast multiple ownership rules. Section 76.55(e) of the Commission's Rules provides that the ADIs to be used for purposes of the initial implementation of the mandatory carriage rules are those published in Arbitron's 1991-1992 *Television Market Guide*.

[4] Because of the topography involved, certain counties are divided into more than one sampling unit. Also, in certain circumstances, a station may have its home county assigned to an ADI even though it receives less than a preponderance of the audience in that county. For a more complete description of how counties are allocated, *see* Arbitron's *Description of Methodology*.

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.[5]

4. The legislative history of this provision indicates that:

where the presumption in favor of ADI carriage would result in cable subscribers losing access to local stations because they are outside the ADI in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

* * * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.[6]

5. The Commission provided guidance in *MM Docket No. 92-259, supra*, to aid decision making in these matters, as follows:

For example, the historical carriage of the station could be illustrated by the submission of documents listing the cable system's channel line-up (*e.g.*, rate cards) for a period of years. To show that the station provides coverage or other local service to the cable community (factor 2), parties may demonstrate that the station places at least a Grade B coverage contour over the cable community or is located close to the community in terms of mileage. Coverage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of local program offerings. The final factor concerns viewing patterns in the cable community in cable *and* noncable homes. Audience data clearly provide appropriate evidence about this factor. In this regard, we note that surveys such as those used to demonstrate significantly viewed status could be useful. However, since this factor requires us to evaluate viewing on a community basis for cable and noncable homes, and significantly viewed surveys typically measure viewing only in noncable households, such surveys may need to be supplemented with additional data concerning viewing in cable homes.

Id. at 2977 (emphasis in original).

6. In adopting rules to implement this provision, the Commission indicated that changes requested should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.[7] The rules further provide, in accordance with the requirements of the 1992 Cable Act, that a station not be deleted from carriage during the pendency of an ADI change request.[8]

7. Adding communities to a station's ADI generally entitles that station to insist on cable carriage in those communities. However, this right is subject to several conditions: 1) a cable system operator is generally required to devote no more than one-third of the system's activated channel capacity to compliance with the mandatory signal carriage obligations; 2) the station is responsible for delivering a good quality signal to the principal headend of the system; 3) indemnification may be required for any increase in copyright liability resulting from carriage; and 4) the system operator is not required to carry the signal of any station whose signal substantially duplicates the signal of any other local signal carried, or the signal of more than one local station affiliated with a particular broadcast network. If, pursuant to these requirements, a system operator elects to carry the signal of only one such duplicating signal, the operator is obliged to carry the station from the ADI whose city of license is closest to the principal headend of the cable system.[9] Accordingly, based on the specific circumstances involved, the addition of communities to a station's ADI may guarantee it cable carriage and specific channel position rights, or may simply provide the system operator with an expanded list of must-carry signals from which to choose (*i.e.*, when the system has used up its channel capacity mandated for broadcast signal carriage, or determined which of duplicating network affiliated stations are entitled to carriage priority).

MARKET FACTS AND ARGUMENTS OF THE PARTIES

8. The communities in question -- Cypress, Fountain Valley, Garden Grove, Huntington Beach, Los Alamitos, Midway City, Rossmoor, Stanton and Westminster, California -- are all located in Orange County, and are part of the Los Angeles-San Bernardino-Corona-Fontana-Riverside, California area of dominant influence ("ADI"). The communities are situated in the southwestern portion of the ADI, approximately 30 miles east of KRCA's city of license.

9. In support of its petition, Paragon states that the channel capacity of its Orange County System varies, but much of it currently operates at 46 channels. Paragon argues that forced carriage of KRCA would have a negative impact on its ability to provide its customers with desired,

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[5] 47 U.S.C. §534(h)(1)(C)(ii).
[6] H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).
[7] *MM Docket No. 92-259*, 8 FCC Rcd at 2977, 2977 n.139.
[8] 47 C.F.R. §76.59.
[9] *MM Docket No. 92-259*, 8 FCC Rcd at 2981.

locally responsive programming, which was Congress' stated rationale for the must carry rules. Paragon also claims that application of the four statutory factors in Section 614(h)(1)(C) support its proposed modification of KRCA's market. First, with respect to historic carriage, Paragon states that it had never carried KRCA on its system prior to the 1993 reintroduction of must carry, although it is currently carrying KRCA in portions of the system, and plans to add KRCA to its remaining territory, as it completes its system rebuild, by 1996. Second, regarding local coverage, Paragon notes that KRCA is geographically removed from its Orange County System by 30 miles and a mountain range. It also states that KRCA's programming is not directed to local coverage of its Orange County System's communities because it is almost entirely non-English (approximately 95% is Asian language programming) and is "foreign" in origin, which has appeal to only a minority of local viewers. Paragon also notes that approximately 50% of KRCA's programming is infomercials. Third, Paragon argues that its system has ample local coverage by 16 other local broadcast stations, 4 local access channels, and a regional cable news channel, Orange County News, which covers local news. Paragon also points out that it carries 4 foreign language channels, including KSCI, San Bernardino, which broadcasts primarily in Asian languages, and which also carries two Vietnamese programs offered by KRCA. Finally, Paragon states that it was unable to identify any commercial ratings for KRCA within Orange County, and in a survey conducted by Paragon regarding additional channels, no subscribers requested carriage of KRCA.

10. In Opposition, Fouce argues that Paragon has failed to meet its burden of proving the facts necessary to justify modification of KRCA's market, and thus its petition must be denied. First, regarding historic carriage, Fouce argues that Paragon has actually carried KRCA on parts of its systems, plans to expand carriage as it rebuilds its system and even promised to carry KRCA voluntarily, even if the Supreme Court overturns the must carry rules. Fouce states that other cable systems in Orange County carry KRCA as well, thus demonstrating that Paragon and other systems have accepted that KRCA serves their communities. In addition, Fouce points to other stations in the same area as KRCA - KVEA, KSCI and KVCR - all of which KRCA has carried since 1987, despite the fact that KSCI and KVCR are licensed to San Bernardino, which is even farther away from Orange County than Riverside. Other systems serving Orange County have also carried KSCI since at least 1981, according to Fouce. Fouce adds that it is misleading to focus on KRCA's pre-1993 carriage history, as Paragon does, because although it has been broadcasting since 1988, it was originally a home shopping station, and only began its Asian-language and other programming in mid-1993.

11. With respect to local coverage, Fouce states that KRCA places a City Grade signal over the communities in question, which the Commission has held can demonstrate local coverage and that Riverside is geographically equidistant or closer to Orange County than other stations Paragon carries. Fouce also notes that geographic distance is inappropriate in this case because for Asian-speaking viewers, city boundaries are much less important because they form communities that cross city and county lines, transforming the entire Los Angeles market into groups of interrelated markets. Third, Fouce refutes Paragon's claim that 50% of KRCA's programming is paid programming, or infomercials, stating that in fact less than 9% of KRCA's weekly programming is paid programming and that the remaining 91% is a variety of English and non-English language news, public affairs, children's and entertainment programs. Fourth, Fouce states that KRCA's programming target audience is significant: Westminster and Garden Grove are the heart of the Southern California Vietnamese community, and are where "Little Saigon" is located. Fouce notes that the Asian population of Westminster is 22.5% and 20.5% for Garden Grove, and that while the total population of Orange County has increased by only about 25% from 1980 to 1990, the Asian population has increased by about 166%. Finally, Fouce argues that "foreign" programming is not incompatible with local appeal, as such programming is of interest to local Asian viewers who have strong family, business, social, language and personal ties to those countries. Moreover, Fouce states that KRCA does provide a significant amount of locally produced programming, primarily the "Little Saigon" entertainment, interview, and news programs, which are only broadcast over KRCA.

12. Regarding the third statutory factor, coverage by other qualified stations, Fouce states that Paragon's argument about already carrying several other local stations is irrelevant because carried to its extreme, it would allow a system to reject all but one local station in every market. Fouce also states that Paragon's carriage of 4 local access stations does not justify excluding KRCA from the market. With respect to Paragon's carriage of other foreign language stations, Fouce argues that this proves that foreign language programming is indeed of value to Paragon's subscribers. Moreover, Fouce states that KRCA's programming is not duplicative of KSCI, and that a significant amount of its programs are broadcast only on KRCA. Finally, regarding local viewing patterns of KRCA, Fouce argues that it is Paragon's own refusal to carry KRCA that has resulted in it not being included in the Orange County television listings, and that Paragon subscribers have complained to either KRCA's station manager, or to the producer of the Little Saigon Television programs broadcast on KRCA, about the unavailability of KRCA on certain parts of the system. Fouce also notes that Paragon has not provided its survey results or shown that the survey was reliable and that, in any case, the survey is irrelevant because it was conducted in March 1993, before KRCA changed its programming from a home shopping station to its current programming.

13. In reply, Paragon states that it does not carry any other station licensed to Riverside, and that although Paragon carries two stations located in the same area as KRCA - KVEA and KSCI - these stations are carried because of the special programming they offer and not because of localism. Thus, Paragon argues that carriage of these stations proves nothing about the purported commonality of Riverside and Orange County. Paragon also states that Fouce has misunderstood the goals of must carry and that the relevant question is not whether a broadcaster's programming has local appeal, but whether it covers local matters. Paragon argues that KRCA's local coverage consists solely of its "Little Saigon" programming which represents a very small portion of KRCA's broadcast day. Paragon also states that it is relevant that its Orange County systems carry a considerably larger number of local broadcast stations than are available in most parts of the country. Finally, Paragon notes that Fouce has failed to produce any figures to rebut Paragon's showing regarding its negligible over-the-air viewership of KRCA in the Orange County system and also

submits an affidavit stating that Paragon has received extremely few requests for carriage of KRCA, when compared to requests for other programming options.

ANALYSIS AND DECISION

14. We shall deny Paragon's Petition because it has not presented sufficient evidence to conclude that Orange County is not a part of KRCA's television market. Applying the four statutory factors, we first note that KRCA has been carried on parts of Paragon's Orange County System since 1993. Although Paragon argues that it only began carrying KRCA due to the reimposition of the must carry rules, it appears that Paragon would carry KRCA even without these rules, based on its letter dated January 10, 1994, in which it indicated that it plans to expand carriage of KRCA as it rebuilds its system and even promised to carry KRCA voluntarily, even if the Supreme Court overturns the must carry rules. Other cable systems in Orange County carry KRCA as well, demonstrating that other systems have accepted that KRCA serves their communities. In addition, other stations in the same area as KRCA - KVEA, KSCI and KVCR - have been carried by Paragon since 1987, despite the fact that KSCI and KVCR are licensed to San Bernardino, which is even farther away from Orange County than Riverside.

15. Second, we find that Paragon has failed to demonstrate that KRCA does not provide local coverage or service to Orange County. KRCA places a City Grade signal over the communities in question, which the Commission has held can demonstrate local coverage. We also agree with Fouce that KRCA's geographic distance from Orange County is unpersuasive due to the fact that Riverside is geographically equidistant or closer to Orange County than other stations Paragon carries.[10] Paragon's argument that it does not carry any other station licensed to Riverside is irrelevant due to the fact that KRCA is the *only* station licensed to Riverside. With regard to the content of KRCA's programming we agree with Fouce that "foreign" programming is not incompatible with local appeal, as such programming is of interest to a significant number of Asian viewers in Orange County who have strong family, business, social, language and personal ties to those countries. In addition to this programming, KRCA also provides locally produced programming, in particular the Little Saigon programs, which are of particular appeal to the Asian community in Orange County, and which are broadcast only over KRCA.[11]

16. Third, we do not believe that Paragon's carriage of other local stations is sufficient to justify exclusion of KRCA from the Orange County market. Although Paragon does carry a number of local stations, it has not demonstrated that it has reached its maximum required must carry capacity. The fact that Paragon already carries other foreign language stations is irrelevant to this analysis unless Paragon can prove that KRCA's programming is substantially duplicative of these stations, which Paragon has also failed to do. Moreover, as Fouce points out, carriage of other foreign language programming demonstrates that such programming is indeed of value to Paragon's subscribers.

17. Finally, we find Paragon's arguments regarding KRCA's lack of ratings in Orange County to be unpersuasive. As Fouce points out, it is likely that a major reason why KRCA is not included in the Orange County television listings is due to Paragon's own refusal to carry KRCA in portions of the county. We also find that Paragon's survey cannot be relied upon as conclusive of the viewing preferences of its subscribers because Paragon has not provided its survey results or shown that the survey was reliable. Even if the survey was substantiated, its results may not be relevant because it was conducted in March 1993, before KRCA changed its programming from a home shopping station to its current programming. We find that Fouce has presented evidence indicating that Paragon subscribers have complained about the lack of KRCA's programming on Paragon's systems, thus indicating that there is potential local viewership in the communities in question. Finally, we note that the Commission has previously recognized that foreign language stations, such as KRCA, once referred to as specialty stations, are capable of "offer[ing] desirable diversity of programming . . . ," yet typically attract limited audiences.[12] We continue to believe, as we did then, that the fact that such stations attract limited audiences must be taken into account in determining the equities concerning such stations' rights to cable carriage.

18. In conclusion, we find that Paragon's Petition is inconsistent with Congressional intent, which clearly states that the market modification policy was not provided as a means for cable systems to avoid their must carry obligations or to discriminate against one station in the market compared to another.[13] Because Paragon has not pointed to particularized evidence that Orange County is not part of KRCA's market, based on the four statutory factors or any other relevant factors, it cannot be permitted to single KRCA out from among other stations in the same area, such as KVEA, KSCI and KVCR, all of which Paragon does carry, and request that its system be deleted from KRCA's television market.

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[10] We also note that the Commission has determined that Riverside is part of the Los Angeles-San Bernardino-Corona-Fontana television market, for purposes of copyright status. *See Report and Order*, MM Docket No. 93-207, 8 FCC Rcd 8472 (1993). While we recognize that this determination is not definitive on the issue of KRCA's must carry rights, we do believe that it is relevant evidence of the connection between Riverside and the greater Los Angeles market, including Orange County. Paragon has not presented us with any information that would lead us to reconsider this determination.

[11] Paragon's argument that KRCA's programming is 50% home shopping is irrelevant because the Commission has held that home shopping stations are entitled to must carry rights (*Report and Order*, MM Docket No. 93-8, 8 FCC Rcd 5321 (1993)), and because KRCA has changed its format to include less than 9% paid programming and that the remaining 91% is a variety of English and non-English language news, public affairs, children's and entertainment programs.

[12] *First Report and Order in Docket No. 20553*, 58 FCC 2d 442, 452 (1976), *recon. denied*, 60 FCC 2d 661 (1976).

[13] H.R. Rep. No. 102-628, 102nd Cong. 2nd Sess. at 97.

MUST CARRY

BACKGROUND

19. On August 2, 1994, Fouce filed a Complaint against Paragon to enforce the Commission's must carry rules and to require the proper carriage of KRCA by Paragon's system serving the principal communities of Garde Grove, Westminster and Huntington Beach, California (the "System"). Paragon filed a response to the complaint on September 15, 1994, and Fouce submitted a reply on September 28, 1994.

SUMMARY OF PLEADINGS

20. In its complaint, Fouce states that Paragon has carried KRCA on its over-the-air channel, Channel 62, since 1993, but that in the Garden Grove area it is carried on Channel 25B, which is available only to a portion of that community's subscribers, and that KRCA is not available at all to certain other parts of the system. Fouce states that this type of carriage violates Section 76.56(d) of the Commission's rules that require local commercial television stations to be provided to "every subscriber of a cable system." Fouce states that KRCA is a "local commercial television station" for Paragon's system under Section 76.55(c) of the Commission's rules, and that it carries foreign language, religious, children's, community affairs and other programming. Fouce states that it asserted its channel position rights for the System in a letter dated January 3, 1994, and that because it was not possible to carry KRCA on its over-the-air channel, or the channel on which it was carried prior to July 19, 1985 or on January 1, 1992, it requested that it and Paragon choose a mutually agreeable channel. Fouce states that by letter dated January 10, 1994, Paragon responded that it would not agree to discuss channel position or to assure carriage of the signal to all subscribers. According to Fouce, it later learned that Paragon would not carry KRCA to all subscribers for two years, until certain portions of its system were built out, and that after subsequent attempts to commence full carriage failed, it sent a letter on July 1, 1994, notifying Paragon of its noncompliance with the mandatory compliance rules and requested that it immediately shift KRCA to a mutually acceptable channel between 2 and 46 so that all subscribers would be able to receive it. Fouce states that Paragon did not respond to KRCA's letter within the required 30-day period, nor complied with the terms of KRCA's letter and that Fouce's complaint was filed within 60 days of the expiration of this 30-day period. Fouce argues that its case is similar to a case involving WLIG-TV, Riverhead, New York, against Cablevision Systems,[14] in which the Commission directed Cablevision to switch WLIG's channel to a lower channel receivable by all subscribers, until its system rebuild was completed. Fouce adds that carriage in these communities is particularly important because they encompass minority communities interested in receiving KRCA's Asian-language programming.

21. In its Opposition, Paragon first argues that Fouce's complaint was not timely filed because such complaint was required to be filed within 60-days from Paragon's January 10, 1994 letter, which is when Paragon first denied carriage of KRCA. Paragon relies on *Johnson Broadcasting Inc.*,[15] in which the Commission held that Prime Cable's denial of carriage of KNWS constituted an affirmative action which triggered the station's right to file a complaint. Paragon's second argument is that KRCA should be deleted from the System's television market for must carry purposes, and thus it filed the above-captioned Petition for ADI modification.

22. In its Reply, Fouce argues that Paragon has effectively conceded its violation of FCC rules by failing to respond to the merits of Fouce's argument. With respect to the timeliness of Fouce's complaint, Fouce argues that Paragon's January 10, 1994 letter cannot be characterized as rejecting Fouce's carriage request. In fact, Fouce claims, this letter promised to carry KRCA by April 1994, and that it would continue to carry KRCA even if the Supreme Court struck down the must carry rules. Fouce distinguishes *Johnson Broadcasting, Inc.* on the grounds that in that case, the letter from the cable operator plainly declined to carry the station, and its holding was limited to a finding that the complaint was not premature, and did not address whether it would have been too late if the station had, like Fouce, continued to negotiate with the cable operator for carriage before filing a complaint. Fouce argues that acceptance of Paragon's argument would have the effect of discouraging stations and operators from trying to reach a mutually acceptable agreement, and instead would encourage the filing of complaints. Finally, Fouce claims that Paragon's Petition to modify the ADI is a retaliatory measure in response to its filing a complaint demanding carriage, by threatening to remove KRCA from all its cable communities, even where KRCA is currently being carried.

ANALYSIS AND DECISION

23. As discussed above, we are denying Paragon's Petition to delete KRCA from its Orange County System for must carry purposes because it did not meet its burden of proving that KRCA was not legitimately a part of the Orange County market. Thus, we turn to Paragon's only other argument in response to Fouce's complaint: whether the complaint was timely filed.

24. We agree with Fouce that its complaint was timely filed. Paragon's January 10, 1994 letter did not constitute a denial of carriage. In fact, Paragon indicated that it would commence carriage in Huntington Beach beginning in April, and that once rebuilding was complete, Paragon would "be happy" to carry KRCA on its over-the-air channel, Channel 62. Paragon's letter goes on to say that "[e]ven if the Supreme Court decides against the must carry rules, I trust that we will be able to accommodate your carriage request, as long as the quality of the programming meets the community's needs, for both Orange County and Los Angeles." Paragon also sent correspondence to Fouce in March of 1994, explaining its construction progress on rebuilding its system and stating that its Huntington Beach customers would begin viewing KRCA on Channel 62 as of May. This letter is a further indication that Paragon's January 10 letter was not a denial of carriage, thus not triggering the 60-day clock for filing a complaint. This case is

[14] *Memorandum Opinion and Order*, CSR-3903-M, DA 93-1365 (November 10, 1993).
[15] CSR-4189-M, DA 94-796 (July 26, 1994).

distinguishable from *Johnson Broadcasting Inc.*, where the letter from the cable operator plainly indicated that it would not carry the station until after the Supreme Court rendered a decision affirming the must carry provisions, and thus opened the 60-day window for filing a complaint demanding carriage. However, in the case before us, because there were on-going discussions between Paragon and Fouce, without a firm statement that carriage would be denied, and yet without proper carriage of KRCA to all subscribers as required under the Commission's Rules, we find that the complaint was timely filed.

25. With respect to the issue of channel capacity, we agree with Fouce that, following the Commission's holding in *WLIG-TV, Inc.*, Paragon is required to make KRCA's signal available to all its subscribers in Garden Grove, Westminster, and Huntington Beach, because KRCA has must carry rights in these communities.[16] In *WLIG-TV, Inc.*, WLIG complained that, despite the fact that it was entitled to must carry rights on Cablevision's systems in Nassau and Suffolk counties on Long Island, New York, WLIG was not available to a number of subscribers' homes because it was being carried on Channel 37, which subscribers in non-upgraded areas could not receive with their 36 channel converter box. Cablevision argued that all subscribers would be able to receive WLIG once their system rebuild was complete, in six months. We held that because WLIG had must carry rights in the communities in question, it could not be required to wait for the rebuild in order to be properly carried, and thus required Cablevision to switch WLIG to a channel currently receivable by all subscribers during the rebuilding of the system.[17] Similarly, in the case before us, we find that KRCA, as a must carry station in Garden Grove, Westminster and Huntington Beach, is not required to wait until Paragon completes its system rebuild in order to be made available to all subscribers in these communities. Thus, Paragon is required to carry KRCA on a mutually acceptable channel, on the basic tier,[18] that is available to *all* subscribers in its system, which in this case is any channel between 2 and 46, pending the completion of rebuilding its system. By doing so, KRCA will be provided to all of Paragon's subscribers on the same basis as other signals entitled to mandatory carriage on the basic tier. Once the system is fully rebuilt, Paragon may move KRCA to its over-the-air channel (Channel 62), or any other mutually agreed upon channel.

ORDERING CLAUSES

26. In view of the foregoing, we find that grant of Fouce's complaint to the extent indicated above, is in the public interest.

27. Accordingly, IT IS ORDERED, That the "Complaint" (CSR-4300-M) filed August 2, 1994, by Fouce Amusement Enterprises, Inc. IS GRANTED to the extent indicated in paragraphs 23-25, *supra*, in accordance with §614(d)(3)(47 U.S.C. §534) of the Communications Act of 1934, as amended.

28. IT IS FURTHER ORDERED, That Paragon Cable SHALL CARRY the signal of KRCA in compliance with this Order within thirty (30) days of its release date on its system serving Garden Grove, Westminster and Huntington Beach, California.

29. IT IS FURTHER ORDERED, pursuant to Section 614(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Section 76.59 of the Commission's Rules, 47 C.F.R. § 76.59, that the "Petition for Special Relief" (CSR-4368-A) filed September 16, 1994 by Paragon Cable IS DENIED. This action is taken pursuant to authority delegated by §0.321 of the Commission's Rules, 47 C.F.R. §0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[16] *See* 47 C.F. R. §76.55(c).

[17] *WLIG-TV, Inc.* was recently affirmed in the Commission's must carry Reconsideration Order. *Memorandum Opinion and Order*, MM Docket No. 92-259, FCC 94-251, para. 16, n.41 (November 4, 1994).

[18] Section 623(b) of the Communications Act requires cable operators to provide their subscribers with a separately available basic service tier containing all must carry signals.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COLORADO INDEPENDENT SCHOOL DISTRICT
Snyder, TX — File No. BPLIF-920821DB

TRENT INDEPENDENT SCHOOL DISTRICT
Roscoe, TX — File No. BPLIF-920203DI

For Construction Permit and License
in the Instructional
Television Fixed Service on
Channels B1, B2, B3, and B4.

MEMORANDUM OPINION AND ORDER

Adopted: January 3, 1995; Released: January 19, 1995

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Colorado Independent School District (Colorado) and Trent Independent School District (Trent), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels B1-B4 in the areas of Snyder and Roscoe, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Colorado is accredited by the Texas Education Agency and proposes to serve the educational needs of students enrolled in schools both within and outside its jurisdiction. Trent, which is also accredited by the Texas Education Agency, proposes to provide ITFS service to students enrolled in accredited schools located outside its jurisdiction. Accordingly, Trent has submitted the requisite letters of intended use from schools that will use its service and has documented the establishment of a local programming committee.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on anotherITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Colorado is entitled to four points for being a school district engaged in the formal education of students enrolled in schools within its jurisdiction. Trent proposes to serve students outside of its jurisdiction and is, therefore, entitled to no points for being a local applicant.[3]

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

[3] On July 8, 1994, Trent amended its application to propose to also serve students enrolled at schools within its jurisdiction. If considered, this amendment would upgrade Trent's comparative position. However, an applicant's comparative position cannot be enhanced by amendments filed after the "B" cut-off date, which was November 9, 1993 in this case. Therefore, the Trent amendment will not be considered. See *Second Report and Order*, 101 FCC 2d at 74.

Accreditation. Colorado, accredited by the Texas Education Agency, is entitled to three points for accreditation. Although Trent proposes to serve accredited schools, a factor which satisfies its basic eligibility, it is not an accredited entity in its own right in the area it proposes to serve, the factor necessary for earning merit points under the accreditation criterion. Therefore, Trent is not entitled to any points for accreditation. See *Instructional Television Fixed Service - Second Report and Order Reconsidered in MM Docket No. 83-523*, 59 RR 2d 1355, 1370 (1986); and *Unified School District #511*, 8 FCC Rcd 7060, 7061 (1993). Also see, note 3 *supra*.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Consequently, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Colorado's illustrative schedule and programming grid propose an average of 41 hours of formal educational programming per channel per week. Colorado is therefore entitled to two programming merit points. Trent's illustrative schedule and programming grid indicate an average of 24.375 hours of formal ITFS programming per channel per week, and Trent is therefore entitled to one program merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. Colorado is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and two points for proposing at least 41 hours of formal educational programming per channel per week, for a total of eleven points. Trent is entitled to two points for observing the four-channel limitation and one point for proposing at least 21 hours of formal educational programming per channel per week, for a total of three points. Thus, the tentative selectee is Colorado.

OTHER MATTERS

5. Colorado proposes to lease its excess capacity for non-ITFS use as permitted by 47 C.F.R. Section 74.931 and has submitted a copy of its lease with Snyder Microwave Communications, L.C., which does not conform in all respects with our requirements. First, the term of the lease as written could extend beyond the ten-year period of the license. Specifically, the lease will run ten years from the "Start Date," which is defined as 30 days after the latest of three events to occur: (1) the satisfaction/waiver of various conditions precedent, including the lessee's acquisition of at least 20 channels in the market area; (2) the completion of construction of 20 channels in accordance with authorized permits and licenses; or (3) the construction of and a grant of a license to operate the present B-channel group. Events (1) and (2) will almost certainly be after the date of grant of this license application, and 30 days after event (3) will, by definition, extend the term of the lease beyond ten years. These provisions are inconsistent with the ten-year maximum term for excess capacity leases permitted by our Rules. *Instructional Television Fixed Service in Gen. Docket Nos. 90-54 and 80-113*, 5 FCC Rcd 6410, 6416 (1990). Second, there is no provision in the lease for acquisition of the ITFS equipment in the event that the lease is terminated as a result of some action on the part of the excess capacity lessee. We believe that, as a matter of policy, such a provision should be added to insure that a licensee will not be forced to interrupt its ITFS programming as a result of any action on the part of its lessee. See *Turner Independent School District*, 8 FCC Rcd 3153, 3155 (1993). Third, Section 11 provides that Colorado will not compete in any way with the excess capacity lessee in any operation for a period of three years beyond the term of the lease. Such covenant not to compete unduly restricts Colorado's operation of the proposed ITFS facility. See *Blackwell Consolidated Independent School District*, 8 FCC Rcd 1721, 1722 (1994). Although inconsistent with our requirements for excess capacity leases, these provisions neither reflect on Colorado's basic or comparative qualifications, nor preclude grant of an authorization. See *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 FCC Rcd 1472, 1473 (1987). Accordingly, Colorado's authorization will be conditioned upon conformity of the lease to Commission requirements.

6. No petitions to deny or informal objections have been filed against Colorado's application, and we find Colorado fully qualified to be an ITFS licensee. We also conclude that grant of Colorado's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Trent Independent School District (BPLIF-920203DI) IS DENIED, and the application of Colorado Independent School District (BPLIF-920821DB) IS GRANTED, subject to the condition that within 30 days of the release of this Order, Colorado submit to the Chief, Distribution Services Branch for approval, information demonstrating compliance with Commission requirements, including, if appropriate, an amended lease agreement conforming in the manner discussed herein.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BARBOUR COUNTY BOARD OF EDUCATION
Ariton, AL — File No. BPLIF-920506DI

GENEVA COUNTY BOARD OF EDUCATION
Elba, AL — File No. BPLIF-930219EL

HOUSTON ACADEMY
Dothan, AL — File No. BPLIF-920214DN

For Construction Permit and License
in the Instructional Television Fixed
Service on Channels A1-A4

MEMORANDUM OPINION AND ORDER

Adopted: January 3, 1995; Released: January 19, 1995

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Barbour County Board of Education (Barbour), Geneva County Board of Education (Geneva), and Houston Academy (Houston), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels A1-A4.[1] The applicants propose to serve the areas of Ariton, Elba and Dothan, Alabama, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a) (1)-(5). All of the applicants are qualified to be ITFS licensees. Barbour and Geneva are school districts that are accredited by the Alabama State Department of Education and that propose to serve the formal educational needs of students enrolled at schools both within and outside their jurisdictions. Houston is accredited by the Southern Association of Colleges and Schools and is proposing to serve its own students, as well as students at other schools located in the area.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[2] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[3] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Barbour and Geneva are school boards proposing to provide ITFS service to schools within their jurisdictions. Houston is a school proposing to provide ITFS service to its own enrolled students.

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[1] On October 17, 1994, Geneva amended its application purportedly to remove its mutual exclusivity with Houston's application. Our review of Geneva's amended application, however, reveals that any grant of Houston's application would cause harmful interference to five of Geneva's seven receive sites. In accordance with 47 C.F.R. Section 74.903, the Geneva application will still be treated as mutually exclusive with the Houston application, as well as the application filed by Barbour.

[2] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[3] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Accreditation. Each applicant is entitled to three points for accreditation. Barbour and Geneva are accredited by the Alabama State Department of Education, whereas Houston is accredited by the Southern Association of Colleges and Schools.

Four-Channel Limitation. None of the applicants is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a programming "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as correct, for comparativepurposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Geneva's illustrative schedule proposes an average of 23.625 hours of formal educational programming per channel per week. However, its programming grid specifies only an average of 21 hours per channel per week of such programming. Using the lesser amount specified, Geneva is deemed to have proposed an average of 21 hours of formal educational programming and, therefore, is entitled to one programming merit point.

Barbour's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational programming per channel per week. Thus, Barbour is entitled to one programming merit point. Houston's illustrative schedule and programming grid propose an average of 21 hours of formal educational programming per channel per week. Thus, Houston is also entitled to one programming merit point.

E- and F- Channel Group Relocation. None of the applicants is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, no applicant is entitled to the one point for such applicants.

Total. Barbour, Geneva and Houston are each entitled to a total of ten points: four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel per week. Because the applicants are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523, ("Third Report and Order")*, 4 FCC Rcd 4830 (1989); *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990); and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[4] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches less than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the three applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. Barbour and Geneva submitted enrollment figures for receive sites located within their respective jurisdictions, as well as for receive sites outside their jurisdictions. However, we cannot count the students from those sites outside their jurisdictions because the letters of intended use were not submitted prior to the "B" cut-off date of June 11, 1993. In addition, most of the letters submitted did not conform with our requirements as outlined in 47 C.F.R. Section 74.932, Note 2. As a result, we will count enrolled students only at schools within Barbour and Geneva's respective jurisdictions. Accordingly, we will credit Barbour with 1,920 students and Geneva with 2,840 students. Houston has submitted timely and properly executed documentation showing that a total of 21,832 students will be served at its receive sites. Because the numbers of students credited to Barbour, 1,920, and to Geneva, 2,840 are less than 80 percent of the number of students credited to Houston, 21,832, Houston will be authorized to operate facilities on Channels A1-A4 and the applications filed by Barbour and Geneva will be denied.

OTHER MATTERS

7. Houston proposes to lease its excess capacity for non ITFS use as permitted by 47 C.F.R. Section 74.931 and has submitted a copy of its lease with Wiregrass Cable Television, which does not, however, entirely conform to the Commission's requirements. Specifically, the lease does not provide for the licensee's right to purchase the ITFS equipment at its fair market value in the event the lease is terminated. We have consistently maintained that the licensee be permitted the opportunity to purchase the ITFS equipment necessary to maintain its operation in the event of any action on the lessee's part which would terminate

[4] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report and Order Recon., supra.* Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from these receive sites indicating an intention to use the proposed service. 47 C.F.R. Section 74.911(c); *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

the lease arrangement. See *Turner Independent School District*, 8 FCC Rcd 3153, 3155 (1993). The lack of such provision does not reflect adversely on Houston's basic or comparative qualifications nor preclude grant of an authorization. Nevertheless, Houston's authorization will be conditioned upon conformity of the lease to Commission requirements. See *Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 FCC Rcd 1472, 1473 (1993).

8. No petitions to deny or informal objections have been filed against Houston's application, and we find Houston fully qualified to be an ITFS licensee. We also conclude that grant of Houston's application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the applications of Barbour County Board of Education (BPLIF-920506DI) and Geneva County Board of Education (BPLIF-930219EL) ARE DENIED, and the application of Houston Academy (BPLIF-920214DN) IS GRANTED, subject to the condition that within 30 days of the release of this Order, Houston submit to the Chief, Distribution Services Branch for approval, information demonstrating compliance with Commission requirements, including, if appropriate, an amended lease agreement conforming in the manner discussed herein.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: January 19, 1995

CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

The American Telephone and Telegraph Company, the National Exchange Carrier Association (NECA) and several local exchange carriers filed revisions to their Cost Allocation Manuals (CAMs) for the separation of regulated and nonregulated costs for the quarter ended December 31, 1994. Listed below are the names of the carriers that filed revisions and the file number assigned to each revision.

Alltel Telephone Company	AAD 95-23
American Telephone and Telegraph Company	AAD 95-5
Ameritech Operating Companies	AAD 95-6
Bell Atlantic	AAD 95-7
BellSouth Corporation	AAD 95-8
Cincinnati Bell Telephone	AAD 95-9
Citizens Utilities Company	AAD 95-10
GTE	AAD 95-11
Lincoln Telephone	AAD 95-12
Nevada Bell	AAD 95-13
NYNEX Telephone Companies	AAD 95-14
Pacific Bell	AAD 95-15
Puerto Rico Telephone Company	AAD 95-16
Rochester Telephone	AAD 95-17
Southern New England Telephone Company	AAD 95-18
Southwestern Bell	AAD 95-19
United & Central	AAD 95-20
U S West, Inc.	AAD 95-21
NECA	AAD 95-22

Parties may file comments on the proposed revisions to the CAMs no later than **February 13, 1995**. Replies should be filed by **February 28, 1995**. Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M Street, N.W. Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Sherice Reams at (202) 418-0810.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-119

In the Matter of

Amendment of Section 73.202(b), RM-8104
Table of Allotments,
FM Broadcast Stations.
(Hermitage, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 11, 1995; Released: January 20, 1995

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 9 FCC Rcd 5752 (1994), proposing the allotment of Channel 226A to Hermitage, Missouri, as that community's first local service. The *Notice* was issued in response to a petition filed by KYOO Broadcasting Company ("petitioner"). Petitioner filed initial comments withdrawing its petition for rule making. No other comments were received.

2. As stated in the appendix to the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's general policy to refrain from making a new allotment to a community absent an expression of interest. Therefore, since there has been no such interest here, we will dismiss the petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of KYOO Broadcasting Company, requesting the allotment of Channel 226A to Hermitage, Missouri, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-125

In re Applications of

BENNETT GILBERT GAINES, INTERLOCUTORY RECEIVER FOR MAGIC 680, INC.
For renewal of License for Station WCBM(AM), Baltimore, Maryland — File No. BR-880830UA

BENNETT GILBERT GAINES, INTERLOCUTORY RECEIVER FOR MAGIC 680, INC. (Assignor)
and
WCBM MARYLAND, INC. (Assignee)
For Consent to the Assignment of License of Station WCBM(AM) Baltimore, Maryland — File No. BAL-881117EB

MOUNT VERNON BROADCASTING
Baltimore, Maryland
For a Construction Permit for a New AM Station on 680 kHz at Baltimore, Maryland — File No. BP-880901AD

MEMORANDUM OPINION AND ORDER

Adopted: January 12, 1995; Released: January 20, 1995

By the Commission:

1. By this action we deny a Petition for Reconsideration filed March 2, 1994, by Mount Vernon Broadcasting (MVB),[1] and Petition for Expedited Relief filed March 17, 1994 by Bennett Gilbert Gaines (Gaines) and WCBM Maryland, Inc. (WMI),[2] and we affirm a Commission order, *Bennett Gilbert Gaines*, 9 FCC Rcd 533 (1994), which in turn, affirmed that part of a Review Board Decision which found MVB was not financially qualified to be a licensee and denied MVB's application. *Bennett Gilbert Gaines*, 8 FCC Rcd 1405, *recon. denied*, 8 FCC Rcd 3986 (Rev. Bd. 1993). The Commission also resolved an unauthorized transfer of control issue in favor of Gaines and WMI, but remanded the proceeding for further hearings concerning the candor of WMI's principal.

2. MVB's Petition for Reconsideration challenges the finding that MVB lacks funds to finance the purchase of its proposed transmitter site and that it is not financially qualified to be a licensee. MVB previously presented arguments concerning its financial qualifications in its Application for Review. It is well settled that a petition for reconsideration which simply reiterates arguments that were previously considered and rejected will be denied. *WWIZ, Inc.*, 37 FCC 685 (1965), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 825 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). Thus, MVB's repetitive arguments are not entitled to further consideration. To the extent that MVB presents new facts seeking to establish its financial qualifications, its proffer is untimely, the facts alleged are not part of the record, and the record establishes that MVB is not financially qualified to be a licensee. Further comments, however, are warranted with respect to arguments by MVB concerning *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), whether the Commission should modify its site availability policies to assume that WCBM's antenna site would be available to MVB as a successor licensee, and the impact of the remanded candor issue on the unauthorized transfer of control issue, as well as Gaines' and WMI's argument that Gaines was improperly assigned the burden of proof in the remanded proceeding.

3. *Bechtel:* MVB in essence argues that in light of the Commission's post-*Bechtel* freeze[3] and its status as a minority applicant, the Commission should recognize that MVB can in fact fulfill the Commission's policy relating to the financial qualifications of broadcast applicants. Although MVB in this regard cites *Statement on Minority Ownership*

[1] Also before the Commission are Oppositions filed March 16, 1994 by WCBM Maryland, Inc. (WMI) and the Mass Media Bureau, and a Reply filed April 5, 1994 by MVB. In its opposition, WMI asserts that having been disqualified, MVB has no right to participate in the remanded hearing. WMI's argument is both substantively and procedurally deficient. WMI did not request reconsideration and, insofar as WMI seeks affirmative relief, the matters raised in its opposition are untimely. 47 C.F.R. § 1.106(f). Moreover, until the denial of MVB's application becomes final, it is entitled to participate in all aspects of the proceeding.

[2] Gaines and WMI filed the Petition with the Review Board, but it was informally referred to the Commission for action because the Commission reserved further appellate proceedings to itself. 9 FCC Rcd at 534 ¶ 11. On March 23, 1994, the Mass Media Bureau filed an Opposition to the Petition for Expedited Relief.

[3] In *Bechtel*, the Court of Appeals held that the Commission's integration criterion for evaluating broadcast applicants is arbitrary and capricious and therefore unlawful. Thereafter, the Commission held in abeyance those aspects of hearing proceedings involving comparative analysis of new applicants' proposals pending its resolution of the issues raised by *Bechtel*. *Public Notice*, 9 FCC Rcd 1055 (1994). Under these circumstances, MVB asserts that if its application is denied along with that of WMI, there will likely be a lengthy delay before an application for the WCBM facilities filed by any other minority owned applicant could be granted.

of Broadcast Facilities, 68 FCC 2d 979, 981 (1978), we have never interpreted our policies favoring minority ownership as excusing an applicant from meeting all relevant qualifications requirements. Even where an applicant is the sole remaining applicant, its failure to establish its financial qualifications in a timely manner is a valid consideration justifying the denial of its application. *Pontchartrain Broadcast Co. v. FCC*, Case No. 93-1291 (D.C. Cir., Feb. 11, 1994). Thus, even though MVB's principal is a minority group member, its failure to establish its financial qualifications during the hearing in this proceeding fully justifies the denial of its application.

4. *Site Availability:* MVB argues that in *George E. Cameron Communications*, 71 FCC 2d 460 (1979), the Commission established a policy in comparative renewal proceedings assuming that the renewal applicant would be receptive to the challenger's offer to purchase or lease the physical facilities. It asserts that the Commission abandoned that policy in the *First Report and Order in Docket 81-742*, 4 FCC Rcd 4780 (1989), and as a result placed an unrealistic burden on MVB to show that it had the ability to acquire, rather than simply leasing, WCBM's current transmitter site.

5. MVB's argument is untimely and is procedurally deficient under 47 C.F.R. § 1.106(b)(2). In any event, MVB is asking the Commission to overturn a policy determination made in a rule making proceeding in which all interested parties had ample opportunity to file comments. In the rule making, the Commission determined that in situations such as here, where the site is not owned by the renewal applicant but by a third party, it would not be "unreasonable to require a challenger to make contingent arrangements with the site owner" to demonstrate that the site would be available should its application be granted. 4 FCC Rcd at 4789 ¶ 67. Consistent with this policy, MVB proposed to purchase its transmitter site, but MVB failed to show that it had the necessary resources to finance the purchase. Accordingly, it was found to lack the financial qualifications to be a licensee. Under these circumstances, MVB has not shown that the Commission's policy is unreasonable, and it has not alleged facts warranting a change in the site availability policy.

6. *The Unauthorized Transfer of Control Issue:* The Review Board concluded that Gaines, as Receiver of WCBM, has retained control over the station's operations and that there has not been an unauthorized transfer of control of WCBM. The Board relied on testimony from Gaines and WMI's principal concerning Gaines' continuing involvement and ultimate responsibility for operating control of the station. The Board also found that two former employees of WCBM, who testified on behalf of MVB, admitted that they did not know whether WMI's principal consulted with Gaines about decision-making at the station.8 FCC Rcd at 1407 ¶ 17. MVB argues that the remanded proceeding calls into question the veracity of WMI's principal and that the Commission will have to reevaluate the transfer of control issue when the evidence adduced in the remanded proceeding becomes ripe for consideration. However, there is no need for further consideration of this question at this time. Compare *Dorothy O. Schulze and Deborah Brigham*, 5 FCC Rcd 3227, 3228 ¶ ¶ 13-14 (1990) (where decisions below were specifically based on explicit credibility findings, ALJ was accorded discretion to reconsider earlier findings if circumstances warranted).

7. *Burden of Proof:* The Commission assigned the burden of proof on the remanded issues to Gaines and WMI. 9 FCC Rcd at 534 ¶ 10. WMI and Gaines argue that the specified issues relate solely to WMI, and that pursuant to *Richard Bott II*, 8 FCC Rcd 4074 (1973), WMI should bear the burden of proof alone. In *Bott* the designated issues related solely to the *assignor's* qualifications to retain its broadcast authorization while here the issues relate to the *assignee's* qualifications to be a recipient of the proposed assignment. Moreover, Gaines could have knowledge and information bearing on the resolution of the remanded issues, and he has a stake, as the proponent of a finding that the public interest would be served by a grant of the assignment application, in establishing that WMI is qualified to be a licensee. Thus, both Gaines and WMI were properly assigned the burden of proof.

8. ACCORDINGLY, IT IS ORDERED, that the Petition for Reconsideration filed March 2, 1994, by Mount Vernon Broadcasting and the Petition for Expedited Relief filed March 17, 1994 by Bennett Gilbert Gaines and WCBM Maryland, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 19, 1994

Released: December 21, 1994

US Cable of Paterson, L.P. c/o
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Smith, Don, Alampi & D' Argenio
210 Sylvan Avenue
Englewood Cliffs, N.J. 07632

Dear Mr. D' Argenio:

This letter is in response to your November 18, 1994 letter on behalf of US Cable of Paterson, L.P. ("US Cable"), seeking a clarification of Section 76.922(d)(3)(iii) of the Commission's rules as applied to US Cable's addition on July 4, 1994 of the new program service *America's Talking* to its regulated basic service tier. You ask whether a prior waiver granted by the Cable Services Bureau that permitted cable operators to begin recovering the external costs resulting from the introduction of *America's Talking* immediately, rather than waiting until their next filing of FCC Form 1210, applies equally where the operator added *America's Talking* to the basic service tier rather than the cable programming services tier. For the reasons described below, we clarify that prior waiver as you request.

Section 76.922(d)(3)(iii) of our rules provides, *inter alia*, that rate adjustments made to reflect changes in external costs shall be based on any changes in those external costs that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210.[1] FCC Form 1210 contains the calculations for cable operators seeking to reflect additional external costs in subscriber rates. Cable operators may file FCC Form 1210 no more often than quarterly.[2] You state that US Cable added *America's Talking* to its basic service tier on July 4, 1994.[3] Therefore, under Section 76.922(d)(3)(iii) of our rules, US Cable generally would have been required to wait to recover the external costs associated with *America's Talking* until its filing of FCC Form 1210 at the end of the third quarter on October 1, 1994. However, you state that US Cable included these costs in calculating the initial maximum permitted rate for its basic service tier on the FCC Form 1210 submitted by US Cable to its local franchising authority, the New Jersey Board of Public Utilities ("NJBPU"), on or about July 13, 1994.[4] Under the 1992 Cable Act, the basic cable service tier is regulated in most cases by local franchising authorities, while cable programming services tiers are regulated by the Commission.[5]

You state that US Cable adjusted its regulated basic tier rates to include the costs of *America's Talking*, as set forth on its initial FCC Form 1210 -- rather than waiting to reflect the costs on its FCC Form 1210 filed at the end of the third quarter -- based upon a waiver of Section 76.922(d)(3)(iii) of the Commission's rules issued on May 23, 1994 by the Cable Services Bureau.[6] This waiver permitted cable operators to reflect on their initial FCC Form 1210 the passed through external costs resulting from the addition of *America's Talking* prior to July 14, 1994.[7] You assert that this waiver concerning *America's Talking* did not explicitly indicate whether the waiver of Section 76.922(d)(3)(iii) of the Commission's rules applies to the addition of *America's Talking* to basic service tiers as well as to cable programming services tiers. We understand that the majority of cable operators adding *America's Talking* to their service offerings added the service to cable programming services tiers. However, you state that US Cable added the service to its basic tier. Therefore, in response to a suggestion from the NJBPU, you seek a clarification and/or waiver of Section 76.922(d)(3)(iii) of the Commission's rules such that the waiver granted in our May 23rd letter concerning the addition of *America's Talking* will apply equally to cable operators adding the service to basic service tiers.

The cable service rate regulations adopted by the Commission, which are contained in Section 76.922 of our rules and which implement the rate regulation provisions of the 1992 Cable Act, apply equally to regulation of both basic service and cable programming services tiers, despite this separation of jurisdiction.[8] Similarly, any waivers or clarifications of these regulations, unless otherwise specified, generally also will apply equally to regulation of both service tiers.

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[1] 47 C.F.R. § 76.922(d)(3)(iii) (1994).

[2] 47 C.F.R. § 76.922(d)(1) (1994).

[3] Your letter to the Cable Services Bureau incorporates an attached letter sent earlier to US Cable's local franchising authority, the New Jersey Board of Public Utilities ("NJBPU"), in which you describe US Cable's situation and position on Section 76.922(d)(3)(iii) of the Commission's rules. Letter of October 4, 1994 from Rinaldo M. D' Argenio, Esq., Smith, Don, Alampi & D' Argenio, on behalf of US Cable of Paterson, L.P., to Ms. Celeste M. Fasone, Director, Office of Cable Television, New Jersey Board of Public Utilities.

[4] The Commission's general rule required that cable systems which selected the benchmark approach to setting initial regulated cable service rates must have brought their rates into compliance with the Commission's modified benchmark system, released March 30, 1994, by June 15, 1994 in order to avoid refund liability. 47 C.F.R. § 76.922(b)(6) (1994). US Cable took advantage of Section 76.922(b)(6)(B) of our rules, which is an exception to this general rule, that permitted cable operators to defer the triggering of refund liability until July 14, 1994, provided that the operator did not change the rate for or restructure any program service or equipment offering between March 30 and July 14, 1994. US Cable thus filed its initial maximum permitted rate schedules on July 13, 1994.

[5] Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), § 623(a)(2), 47 U.S.C. § 543(a)(2).

[6] *See In re America's Talking*, DA 94-522 (Cable Services Bureau, released May 23, 1994).

[7] *Id.*

[8] Section 76.922 of our rules makes no distinction between rates for basic as opposed to cable programming services.

Therefore, we clarify that our waiver of Section 76.922(d)(3)(iii) of our rules to permit operators that added *America's Talking* and other similarly situated program services to basic cable service tiers prior to July 14, 1994 to pass through the costs of adding the program service during the third quarter, and to reflect these costs in their initial filing of FCC Form 1210 at the local level applies equally to basic service tiers. This decision is limited to the circumstances described in your letter and is subject to the same limitations and considerations set out in our previous letters concerning *fX* and *America's Talking*.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 19, 1994

Released: December 21, 1994

Black Entertainment Television, Inc. c/o
Maurita K. Coley, Esq.
Senior Vice President, Legal Affairs
1232 31st Street, N.W.
Washington, D.C. 20007

Dear Ms. Coley:

This is in response to your letter of July 11, 1994 on behalf of Black Entertainment Television, Inc. ("BET"), seeking clarification of Section 76.922(d)(3)(X) of the Commission's rules governing offset requirements by cable operators of revenues received from programmers in exchange for carriage on the cable system,[1] as applied to BET's planned new program service called *BET on Jazz*.

You state that, because of a current widespread shortage of channel capacity on cable systems, BET plans to introduce *BET on Jazz* on a part-time basis until it can secure its own 24-hour channel. You indicate that *BET on Jazz*, therefore, is considering "piggy-backing" or sharing a single cable channel on some systems with other program services, including shop-at-home services such as the Home Shopping Network and QVC. First, you note that Section 76.922(d)(3)(X) of our rules requires cable operators to offset against programming costs for services any revenues received from programmers in exchange for carriage when calculating costs that may be passed-through to subscribers as external costs. You also note that we have clarified that this requirement may be fulfilled if offsetting is applied on a "channel-by-channel" basis, under which any payments in consideration of carriage from a programmer will be applied to payments from the operator to that programmer.[2] In addition, we stated that, where, as in the case of home shopping services, payments are only made from the programmer to the operator, or, where the payments from the programmer exceed payments from the operator, the operator may receive the benefit of the payments without decreasing or increasing charges to subscribers.[3]

You argue, however, that these rulings do not address how a cable operator may fulfill offset requirements when a single cable channel is shared between a home shopping service that generates revenues for the operator and a new, non-shopping program service for which the operator pays a license fee. You assert that if our clarification permitting "channel-by-channel" offsetting is interpreted such that cable operators are required to offset the sales commissions from the incumbent home shopping service against the programming costs for *BET on Jazz*, and thus are prohibited from passing through the aggregate programming cost of adding *BET on Jazz*, operators simply will not add the new service. You thus seek clarification that a cable operator introducing *BET on Jazz* part-time onto a channel on which a traditional home shopping service already is carried, will not become subject to Section 76.922(d)(3)(X) of our rules.

The offset requirement of Section 76.922(d)(3)(X) is designed to protect subscribers by assuring that programming costs that may be passed through to subscribers fully reflect any compensation received by the operator from the programmer in consideration of carriage, such as home shopping sales commissions. In our letters permitting regulated cable systems to carry the Home Shopping Network and the QVC Network without offsetting, we stated that, "[u]nder a channel-by-channel offset, any rebates or payments in consideration of carriage from a programmer will be applied to payments from the operator to *that* programmer, but will not offset payments to other programmers."[4] We now clarify that, where a single cable channel is shared by different program services, the channel-by-channel standard for offsetting may be applied on a programmer-specific basis. Under this approach, the fulfillment of offset requirements by a cable operator with respect to one programmer on a particular channel will not bear on that operator's offset requirements with respect to the other programmer sharing the same channel -- that is -- the program services sharing the same channel may be treated as two distinct channels for purposes of offsetting and pass-through requirements. We believe that this approach will maintain incentives for cable operators to add diverse programming to their service offerings, and will preserve operators' latitude to organize these offerings on their channel line-ups as they see fit given market forces.

The underlying purpose of Section 76.922(d)(3)(X) of our rules is to ensure that subscribers pay fair rates based only on cable operators' net costs of obtaining programming.[5] In this light, we are concerned that allowing operators to share a single channel between one program service that generates revenues for the operator and another service for which the operator pays a license fee, without offsetting the respective revenues and costs, could lead to artificially unreasonable rates for consumers if both services are provided by the same programmer. We believe that the results of such an arrangement, in which subscribers essentially would reimburse the operator for fees paid to a programmer while the operator simultaneously receives revenues from that programmer, would be inconsistent with the goals of the offset rule. Therefore, we will limit application of the clarification described in this letter to those situations where the program services sharing the same channel are provided by different programmers, i.e., where the programmers are ultimately controlled by separate and distinct entities. For example, if one party owned a majority of the voting stock in the program service that charges cable operators a license fee, while a different party

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[1] 47 C.F.R. § 76.922(d)(3)(x) (1994); s ee also Instructions for Line B1a, FCC Form 1210.

[2] *In re QVC Network, Inc.* (released May 9, 1994, Cable Services Bureau); In re The Home Shopping Network (released May 9, 1994, Cable Services Bureau).

[3] *Id.*

[4] *See, e.g., In re QVC, Inc.* at 2 (emphasis added).

[5] *See, e.g., In re QVC Network, Inc.* at 2.

owned a majority of the voting stock in the company that provides the home shopping channel, we would be satisfied that the sharing of a single cable channel between these program services, without offsetting, would not present a serious risk of harm to consumers.

We believe that clarifying our Section 76.922(d)(3)(X) of our rules, as described in this letter, merely extends our prior clarification concerning channel-by-channel offsetting in light of cable operators' practical considerations when arranging their channel line-ups to maximize subscribership and viewership. We further believe that this clarification fairly balances the interests of programmers in securing carriage on cable operators' systems with subscribers' interests in reasonable rates.

Accordingly, we clarify that cable operators may share a single cable channel between such home shopping services as the Home Shopping Network or QVC and BET's planned service called *BET on Jazz*, without offsetting the revenues and the programming costs of the respective services, pursuant to Section 76.922(d)(3)(X) of our rules. We limit this clarification to the conditions described in your letter.[6]

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

[6] Other parties seeking to share channels in a manner similar to that proposed by BET must obtain from the Commission separate permission to do so without offsetting the respective revenues and costs. We will consider such requests subject to the limitations and considerations described in this letter.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 19, 1994

IN REPLY REFER TO:
DA 94-1508

Released: December 23, 1994

Peter H. Feinberg, Esq.
Dow, Lohnes & Albertson
1255 Twenty-Third Street
Washington, D.C. 20037-1194

Dear Mr. Feinberg:

This letter is in response to your inquiry of December 5, 1994 seeking clarification of the new "going forward" rules[1] on behalf of Cox Communications, Inc. You specifically ask about the Commission's policy governing the addition of new programming channels in the fourth quarter of 1994. You note that a provision of the *Going Forward Order* and the rules implementing the *Order* may be inconsistent. Specifically, you point to the language in the *Order* which states:

> while we are requiring that operators use either the existing or the new going forward rules consistently for channel additions to CPSTs after December 31, 1994, an operator that chooses to use the new rules after that date may, but is not required to, adjust rates to reflect the new rules for channel additions made between May 15, 1994 and December 31, 1994.

You then state that Section 76.922(e)(1) of the rules seems to permit operators to choose between the existing rules and the new rules only where a system has not only added a channel by December 31, 1994 but has also adjusted its rates, under the old formula, for that channel by that date.[2] You indicate this would seemingly preclude an operator from using the existing "going forward" rules for new channel additions in the fourth quarter of 1994 if an operator wishes to take advantage of the new "going forward" channel adjustment methodology for channels added after December 31, 1994. You also suggest that such a "result would clearly be contrary to the Commission's intentions to allow operators who actually added channels in 1994 in reliance on the existing rules, to continue to apply the existing rate adjustment rules to those channels while opting to apply the new rules to channels added in 1995 and thereafter.

As you note, the new "going forward" rules require that an operator elect to apply either our new rules or our current rules the first time it adjusts rates on a system after December 31, 1994, to reflect a channel addition to a CPST (as defined in the *Order*) or, in the case of a single tier system, to the basic service tier that occurred on or after May 15, 1994. The operator must then use the elected methodology for all rate adjustments for the system through December 31, 1997.[3] Under our rules, a system's rate may be adjusted quarterly to reflect channel additions through the end of the previous calendar quarter.[4] The rules also require that a system's rates must be adjusted within a year to reflect channel additions made prior to October 1, 1994 or the right is lost.[5] As you suggest, the requirement that an operator use the current or the new "going forward" rules consistently beginning the first time it adjusts rates on a system after December 31, 1994 to reflect a channel addition occurring after May 15, 1994 seems to preclude the operator from using the existing "going forward" rules for new channels added in fourth quarter of 1994 if the operator wants to use the new "going forward" channel adjustment methodology for channels added after December 31, 1994.

This reading would be inconsistent with the policy behind the Commission's decision to allow, but not to require, an operator that chooses to use the new rules after December 31, 1994 also to adjust rates for channel additions made between May 15, 1994 and December 31, 1994 under the new rules. That flexibility was allowed because some operators may have relied on the current rules in deciding to add channels prior to December 31, 1994 but before the new *Going Forward Order* was released. Furthermore, operators who added channels prior to October 1, 1994 may have relied on our rules that allow rate adjustments to occur up to year after the channel addition. The same reliance issues exist with respect to channels added during the last calendar quarter of 1994 if the operator was contractually bound, prior to the release of the *Going Forward Order*, to introduce a channel no later than that time period. Therefore, to the extent the *Going Forward Order* and Section 76.922(e)(1) of the rules would preclude raising rates under the existing rules after December 31, 1994 for channels added by that date, and then adjusting rates under the new "going forward" rules for channels added after that date, we find good cause to waive the rule. We believe this decision best balances operators' need for a stable planning environment, their legitimate reliance on existing rules, and subscribers' interests in receiving additional services at reasonable rates. Given that this same rationale is applicable to other cable operators this letter constitutes a blanket waiver applicable to all similarly situated operators.

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[1] *See* Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking (the "*Going Forward Order*"), MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994).

[2] This requirement is also reflected in paragraph 65 of the *Going Forward Order*.

[3] *See Going Forward Order* at para. 65.

[4] *See* 47 C.F.R. 76.922(d)(3).

[5] *Id.*

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
December 19, 1994

IN REPLY REFER TO:
DA 94-1509

Released: December 23, 1994

J. Christopher Redding, Esq.
Dow, Lohnes & Albertson
1255 Twenty-Third Street
Washington, D.C. 20037-1194

Dear Mr. Redding:

This letter is in response to your inquiry of December 12, 1994 seeking clarification of the new "going forward" rules[1] on behalf of US Cable Corporation. You specifically ask about the Commission's policy governing the addition of new programming channels in the fourth quarter of 1994. You note that a provision of the *Going Forward Order* and the rules implementing the *Order* may be inconsistent. Specifically, you point to the language in the *Order* which states:

> while we are requiring that operators use either the existing or the new going forward rules consistently for channel additions to CPSTs after December 31, 1994, an operator that chooses to use the new rules after that date may, but is not required to, adjust rates to reflect the new rules for channel additions made between May 15, 1994 and December 31, 1994.

You then state that Section 76.922(e)(1) of the rules seems to permit operators to choose between the existing rules and the new rules only where a system has not only added a channel by December 31, 1994 but has also adjusted its rates, under the old formula, for that channel by that date.[2] You indicate this would seemingly preclude an operator from using the existing "going forward" rules for new channel additions in the fourth quarter of 1994 if an operator wishes to take advantage of the new "going forward" channel adjustment methodology for channels "added after December 31, 1994. You also suggest that such a result would clearly be contrary to the Commission's intentions to allow operators who actually added channels in 1994 in reliance on the existing rules, to continue to apply the existing rate adjustment rules to those channels while opting to apply the new rules to channels added in 1995 and thereafter.

As you note, the new "going forward" rules require that an operator elect to apply either our new rules or our current rules the first time it adjusts rates on a system after December 31, 1994, to reflect a channel addition to a CPST (as defined in the *Order)* or, in the case of a single tier system, to the basic service tier that occurred on or after May 15, 1994. The operator must then use the elected methodology for all rate adjustments for the system through December 31, 1997.[3] Under our rules, a system's rate may be adjusted quarterly to reflect channel additions through the end of the previous calendar quarter.[4] The rules also require that a system's rates must be adjusted within a year to reflect channel additions made prior to October 1, 1994 or the right is lost.[5] As you suggest, the requirement that an operator use the current or the new "going forward" rules consistently beginning the first time it adjusts rates on a system after December 31, 1994 to reflect a channel addition occurring after May 15, 1994 seems to preclude the operator from using the existing "going forward" rules for new channels added in fourth quarter of 1994 if the operator wants to use the new "going forward" channel adjustment methodology for channels added after December 31, 1994.

This reading would be inconsistent with the policy behind the Commission's decision to allow, but not to require, an operator that chooses to use the new rules after December 31, 1994 also to adjust rates for channel additions made between May 15, 1994 and December 31, 1994 under the new rules. That flexibility was allowed because some operators may have relied on the current rules in deciding to add channels prior to December 31, 1994 but before the new *Going Forward Order* was released. Furthermore, operators who added channels prior to October 1, 1994 may have relied on our rules that allow rate adjustments to occur up to year after the channel addition. The same reliance issues exist with respect to channels added during the last calendar quarter of 1994 if the operator was contractually bound, prior to the release of the *Going Forward Order*, to introduce a channel no later than that time period. Therefore, to the extent the *Going Forward Order* and Section 76.922(e)(1) of the rules would preclude raising rates under the existing rules after December 31, 1994 for channels added by that date, and then adjusting rates under the new "going forward" rules for channels added after that date, we find good cause to waive the rule. We believe this decision best balances operators' need for a stable planning environment, their legitimate reliance on existing rules, and subscribers' interests in receiving additional services at reasonable rates. Given that this same rationale is applicable to other cable operators this letter constitutes a blanket waiver applicable to all similarly situated operators.

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[1] *See* Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking (the "*Going Forward Order*"), MM Docket Nos. 92-266 and 93-215, FCC 94-286 (released November 18, 1994).

[2] This requirement is also reflected in paragraph 65 of the *Going Forward Order*.

[3] *See Going Forward Order* at para. 65.

[4] *See* 47 C.F.R. 76.922(d)(3).

[5] *Id.*

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEWSCHANNEL, A DIVISION OF LENFEST PROGRAMMING SERVICES, INC. — CSR-4295-P

Petition for Public Interest Determination under 47 C.F.R. § 76.1002(c)(4) Relating to Exclusive Distribution of NewsChannel

MEMORANDUM OPINION & ORDER

Adopted: December 16, 1994; Released: December 16, 1994

By the Chief, Cable Service Bureau:

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I. INTRODUCTION

1. The Commission has before it a petition filed by NewsChannel, a Division of Lenfest Programming Services, Inc. ("LPSI"), a regional and local news network, requesting a public interest determination pursuant to Section 628(c) of the Communications Act of 1934 (the "Communications Act") and Section 76.1002(c)(4) of the Commission's rules authorizing NewsChannel to enter into exclusive program distribution agreements with its cable affiliates. NewsChannel contends that granting its request will serve the public interest because it will promote the development of diverse programming while providing viewers with increased access to local news and information.

2. The petition was placed on public notice on August 26, 1994, and is unopposed. Based on the record before us, and pursuant to the criteria set forth in the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), we have determined that allowing NewsChannel to enter into limited exclusive distribution arrangements with multichannel video programming distributors, as described below, is in the public interest. We thus will grant NewsChannel's petition.

II. BACKGROUND

3. Section 628(c)(2)(D) of the 1992 Cable Act provides that, in areas served by a cable operator, exclusive contracts for satellite cable programming between vertically integrated programming vendors and cable operators are prohibited unless the Commission determines that such exclusivity is in the public interest.[1] In determining whether the proposed exclusivity is in the public interest, the statute directs the Commission to consider five specific factors:

> (a) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;
>
> (b) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;
>
> (c) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;
>
> (d) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and
>
> (e) the duration of the exclusive contract.[2]

4. NewsChannel is a Division of LPSI which is a wholly owned subsidiary of Lenfest Communications ("Lenfest"). Lenfest is a multisystem cable operator ("MSO"), whose systems serve nearly 600,000 subscribers in Southeastern Pennsylvania and Southern New Jersey.[3] Lenfest's ownership of NewsChannel is an "attributable interest" pursuant to Section 76.1000(b) of the Commission's rules, therefore NewsChannel is subject to the Commission's program access rules. Accordingly, NewsChannel may not provide a cable system affiliate the exclusive right to distribute

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[1] Section 628(c)(2)(D) of the Communications Act, 47 U.S.C. § 548(c)(2)(D). Section 628(c)(2)(C) of the 1992 Cable Act contains a flat prohibition against "practices, understandings, arrangements and activities, including exclusive contracts ... between a cable operator and a [vertically integrated programming vendor]" in areas not served by a cable operator as of October 5, 1992. *See* 47 U.S.C. § 548(c)(2)(C). We note that this *per se* prohibition against exclusivity is not implicated in this case because the petition seeks authority for exclusive distribution in served areas only.

[2] *See* Communications Act § 628(c)(4), 47 U.S.C. § 548(c)(4).

[3] Lenfest Petition at 2. Lenfest also will soon provide service in Delaware. Lenfest passes nearly one million homes overall.

NewsChannel within the operator's franchise area without an affirmative determination by the Commission that such exclusive distribution meets the public interest criteria set forth in Section 628(c)(4) of the 1992 Cable Act.[4]

5. According to petitioner, over the past three years LPSI has been developing the technology and programming sources for the NewsChannel service. On May 18, 1994, NewsChannel launched the service on a test basis on Lenfest's Doylestown, Pennsylvania cable system. The service is "designed to deliver news and information tailored to each community on a system headend basis."[5] To tailor the news to the particular community, NewsChannel has developed a "proprietary computer software and unique hardware" to produce community segments and "sophisticated computer technology" for the headend to select from the digital satellite feed the appropriate local segment for that particular system.[6] NewsChannel seeks authority to enter into exclusive distribution contracts with cable system operator affiliates in four states: Pennsylvania, New Jersey, Maryland and Delaware ("the mid-Atlantic states"), by which the affiliate would receive an exclusive license to distribute NewsChannel in its service areas for a period of seven years. NewsChannel petitions the Commission that its proposed exclusivity meets the statutory public interest standard.

III. SUMMARY OF PETITIONER'S ARGUMENTS

6. As support for its petition, NewsChannel heavily relies on our decision in *New England Cable News ("NECN")*,[7] granting a petition for exclusivity for a new regional news programming service. NewsChannel argues that like NECN, it also faces significant financial hurdles due to the limited distribution area of its regional news service. NewsChannel contends that exclusivity is necessary not only for the financial viability of its service, but simply to launch the service. NewsChannel contends that with the ability to offer exclusive distribution to affiliates, it will secure distribution of its service and ensure financial survival and the ability to provide more subscribers greater programming options through the unique and innovative technology used in delivery of the service.

7. NewsChannel describes the programming service as "consisting of computer generated headlines, text, photos, graphics and video. Off-screen announcers will read short stories over the screen presentation, supplemented by audio soundbites where appropriate."[8] In order to deliver news and information tailored to the particular community, NewsChannel states that it will contract with local newspapers for source material. The various local newspapers will send the community oriented news and information to NewsChannel to be summarized and packaged into short segments by the NewsChannel staff, giving the newspapers on-screen credit for the source material. The local segments are combined with regional, national and international segments, all of which "are digitally produced using proprietary computer software and unique hardware configurations."[9] The segments are transmitted via satellite as an addressed digital stream. NewsChannel states that for each affiliate's headend, the cable operator must install"sophisticated computer technology.[10]

8. NewsChannel contends that the service will benefit the public interest by providing viewers increased access to community news.[11] NewsChannel further contends that the format of the service allows greater access to hearing impaired and visually impaired subscribers by providing the text of the stories on the screen and by providing off-screen announcers to read the text of the stories.[12]

9. NewsChannel contends that the development of the service involved three years of effort and an investment of over $3.25 million dollars to develop the innovative technology needed for a highly specialized delivery system.[13] NewsChannel anticipates that it will have to invest an additional $3 million in order to break even.[14] NewsChannel intends to make the service available on Lenfest systems and to unaffiliated operators in the relevant local markets.[15] NewsChannel argues that the ability to obtain distribution beyond the Lenfest systems is critically important to the service's financial viability.

10. NewsChannel further argues that the inability to offer exclusivity to operators will be an impediment to successful carriage negotiations,[16] and that for certain operators exclusivity is a condition precedent to carriage by that system. NewsChannel notes that one of the largest operators in the area has taken this position and that this operator's "support is necessary for the commercial viability of the channel because that MSO's subscriber base is critical for subscriber revenue and whose advertising base is necessary for the successful sale of regional advertising."[17] NewsChannel argues that without the ability to offer exclusivity "the prospect of obtaining critical mass of cable affiliates necessary to ensure financial viability appears bleak and the future of both Newschannel's innovative programming and unique technology is uncertain at best."[18]

11. NewsChannel states that in *NECN* the Commission applied the five statutory factors to the facts and found that exclusivity was necessary to attract investment and secure distribution that was essential for financial survival. NewsChannel argues that its situation presents an even stronger case than *NECN* for the proposed exclusivity. NewsChannel argues that like *NECN*, NewsChannel is a new start-up news service that must grant program exclu-

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[4] *See First Report and Order, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-265 (*"Program Access Order"*) 8 FCC Rcd 3359, 3384 (1993), *recon. pending. See also* para. 3, *supra*.

[5] Petition at 2.

[6] *Id.* at 3.

[7] 9 FCC Rcd 3231 (1994).

[8] Petition at 2-3. The news runs in ten minute cycles (each cycle is a mix of news, weather, community information, public affairs and advertising) and is continually updated by NewsChannel. *Id.* at 3.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 4

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 5.

[16] *Id.* at 6

[17] *Id.* at 5 (quoting Petition, Exh. 1, Declaration of Donald L. Heller, Vice President Lenfest Communications).

[18] *Id.* at 6.

sivity to secure distribution agreements.[19] NewsChannel argues that while the Commission held in *NECN* that exclusivity was necessary for NECN's survival, in this case exclusivity is necessary for NewsChannel's launch and rollout. In addition, NewsChannel states that NECN was granted exclusive distribution rights in six states, while it is seeking the right to grant exclusive distribution only in four states.[20]

12. With respect to the effect on competition from other multichannel video programming distributors ("MVPDs"), NewsChannel argues that the exclusivity sought here will not result in outright denial of access to programming.[21] NewsChannel states that it is not aware of any multichannel multipoint distribution service ("MMDS") or satellite master antenna TV ("SMATV") operator interested in distributing the programming service. Moreover, NewsChannel argues that due to the large start-up costs of equipping each headend and the limited channel capacity of wireless cable systems, it is unlikely that NewsChannel is an option for wireless cable operators.[22] NewsChannel further argues that the exclusivity here, like that in *NECN*, will not impact the national distribution market because NewsChannel's community specific method of distribution make it unlikely that direct broadcast satellite ("DBS") operators will have an interest in carrying such programming.[23] NewsChannel states that "[p]erhaps the only alternative category of multichannel video provider that may be interested in the carriage of NewsChannel would be video dialtone."[24] NewsChannel contends that because it will not have exclusivity with respect to news sources, if NewsChannel proves to be successful, there is nothing to prevent the development of a similar service.[25] NewsChannel concludes that the denial of service to DBS, MMDS or any other local or national MVPD would be inconsequential.[26]

13. NewsChannel argues that exclusivity for its service, like the *NECN* exclusivity, is in the public interest because the exclusivity is necessary to attract the necessary investment and secure distribution essential to financial survival. NewsChannel argues that "the Commission has recognized the benefits associated with exclusivity are particularly relevant' to the public interest consideration of allowing a start-up regional or local venture grant exclusive distribution rights to its cable affiliates."[27] NewsChannel states that LPSI has invested a significant amount of financial resources in the service and must believe that it will obtain a secure financial base in order to continue the project. NewsChannel contends that the ability to offer exclusivity removes a barrier toward financial viability.[28] NewsChannel further argues that in *NECN* the Commission relied heavily on the fact that NECN was not offering a national news service, but a regional service with limited distribution potential. NewsChannel argues that NewsChannel's local focus is even more limited than the regional nature of NECN, thus, making exclusivity here even more critical in attracting cable affiliates.[29]

14. Finally, NewsChannel argues that the conclusion reached in *NECN*, that NECN needed an opportunity to establish itself in order to survive financially, is also true here.[30] Newschannel contends that it must be able to offer long term exclusivity as an incentive to carry the programming and use the technology. NewsChannel states that where NECN had been in operation for two years and reached one million subscribers, Newschannel was launched only three months ago on a test basis and, therefore, its service will take as long, if not longer, to develop than NECN's. Moreover, NewsChannel argues that due to the time needed for negotiations to obtain agreements with local papers and to design and install equipment at each cable system headend, it will be able to roll out only one or two systems per month and thus exclusive distribution rights for seven years or longer is reasonable.[31]

IV. ANALYSIS

15. The program access provisions in the 1992 Cable Act were enacted to increase competition and diversity in the multichannel video programming distribution market.[32] When adopting the statute, Congress was concerned with its finding that the majority of cable operators enjoyed a monopoly in program distribution at the local level,[33] and concluded that the use of exclusive contracts between vertically integrated programming vendors and cable operators served to inhibit the development of competition among distributors.[34] In addition, Congress found that increased horizontal concentration of cable operators together with extensive vertical integration has created an imbalance of power between operators and unaffiliated programming vendors, and operators and their multichannel competitors, which also impedes the overall development of competition.[35]

16. Thus, in the 1992 Cable Act, Congress absolutely prohibited exclusive contracts between vertically integrated programming vendors and cable operators in areas unserved by cable, and prohibited such exclusive contracts within areas served by cable absent a specific public interest showing, for a period of ten years.[36] Congress recognized that in areas served by cable, some exclusive contracts between vertically integrated programming vendors and cable operators may provide countervailing benefits to the programming market or to the development of com-

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19 *Id.* at 8
20 *Id.* at 9
21 *Id.* at 11.
22 *Id.* at 11.
23 *Id.*
24 *Id.* at 12 n.25.
25 *Id.*
26 *Id.* at 12.
27 *Id.* at 13 (quoting *NECN*, 9 FCC Rcd 3236, ¶ 33).
28 *Id.*
29 *Id.* at 14.
30 *Id.* at 17 (citing *NECN*, 9 FCC Rcd at 3237, ¶ 48).
31 *Id.* at 18.
32 *See* Communications Act § 628(a), 47 U.S.C. § 548(a).
33 1992 Cable Act, § 2(a)(4); House Comm. on Energy and Commerce, House Rep. No. 102-268, 102d Cong., 2d Sess. at 42 (1992).
34 1992 Cable Act, § 2(a)(5); Senate Comm. on Commerce, Science, and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. at 25-26 (1991).
35 *See Program Access Order*, 8 FCC Rcd at 3366.
36 *See* Communications Act §§ 628(c)(2)(D), (4), and (5), 47 U.S.C. §§ 548(c)(2)(D), (4), and (5).

petition among distributors.[37] Congress provided that where such an exclusive contract is demonstrated to be in the public interest, it should be allowed. The public interest criteria set forth in the 1992 Cable Act reflect the benefits to the programming market that exclusivity in areas that are served by cable may provide in a particular case, which ultimately can rebut the presumption inherent in the statute's program access provisions that the use of exclusivity between vertically integrated programming vendors and cable operators frustrates the development of competition.

17. Any agreement between a vertically integrated programming vendor and a cable operator that grants a cable operator the exclusive right to distribute programming within its franchise area must be approved by the Commission before it may be enforced.[38] When engaging in an examination of the proposed exclusive distribution agreement, the Commission will examine the effect of a particular exclusive contract on each of the public interest factors listed in Section 76.1002(c)(3). The Commission has determined that any party seeking a determination that such an agreement meets the statutory public interest standard bears the burden of demonstrating that the proposed exclusivity provides sufficient public interest benefits to outweigh the presumptively anticompetitive effect on competing distributors. The Commission has determined that it will examine petitions for exclusivity on a case-by-case basis[39] and will consider the public interest criteria as a whole in making the statutory determination.[40]

18. Thus, petitioner bears the burden of demonstrating that the benefits of exclusivity on the programming market in this case outweigh the effects on non-cable competitors ability to compete and the effects on the national and local multichannel video programming distribution market.

A. Effects of Exclusivity on the Development of Competition in the Distribution Market

19. The public interest factors require us to consider the effect of the exclusivity at issue on two aspects of competition to incumbent cable operators. One statutory factor requires the Commission to consider the effect on the development of competition in local and national programming distribution markets; another statutory factor requires the Commission to consider the effect on competition from MVPD technologies other than cable.[41] As the Commission stated in *Time Warner* and *NECN*, "[i]n conjunction with this examination, we believe it is appropriate to evaluate the geographic extent of the proposed exclusivity to identify the relevant markets within which the proposal may affect the development of competing distributors."[42] The Commission has determined that a petitioner may rebut the presumption that exclusive contracts act as a barrier to entry into the MVPD market with a showing that competitive entry is not affected, or that any effects are minimal compared to countervailing public interest benefits to the programming market.[43]

20. With respect to the national distribution market, we note that the proposed exclusivity is limited to the franchise areas of cable systems in the four mid-Atlantic states. National distribution services will be affected by the proposed exclusivity only in this area. However, we believe that NewsChannel has demonstrated that the technical requirements involved in the delivery of the programming service on a community specific basis and the local and regional nature of the service make it unlikely that the proposed exclusivity will effect competition from the national distribution technologies.

21. Petitioner argues that competitors in the local markets in the mid-Atlantic states will be minimally affected by the proposed exclusivity. As noted above, Congress and the Commission found that access to programming by competitors is an essential prerequisite to the ability to compete against incumbent cable operators. Moreover, as discussed in *Time Warner*, denial of access to popular programming inhibits a competitor's ability to gain subscribers and effectively to compete against the cable operator with the exclusive contract.[44] However, NewsChannel is a new service and its demand is unknown. Because at this point in time the service cannot be considered popular programming, we believe that the proposed exclusivity will not effect the ability of existing alternate technology MVPDs to compete. The fact that no non-cable competitor has expressed an interest in obtaining the service supports our conclusion here.

22. With respect to competitors' ability to enter the local distribution market, NewsChannel identifies video dialtone providers as a category of MVPDs that may be interested in carrying the service. However, NewsChannel dismisses the effect of the proposed exclusivity on this category of MVPD by contending that if NewsChannel becomes successful any entity would be able to develop a similar programming service. The Commission rejected a similar argument in *Time Warner*, stating that "[w]e cannot imagine that Congress intended the Act to be used to force competitors to develop their own programming, which is precisely what the statute was enacted to prevent."[45] Thus, we are not persuaded by this argument. However, because we do not have any evidence at this time that the exclusivity will effect competition from non-cable MVPDs, the benefits that we believe will inure to the programming market (as discussed below) weigh in favor of granting the exclusivity.

B. Public Interest Benefits of Exclusivity on the Programming Market

1. Attraction of Capital Investments in Production and Distribution of Programming

23. Congress and the Commission recognized that exclusivity in some circumstances can serve as an investment incentive for cable operators to finance, promote and carry

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[37] *See* Communications Act §§ 628(c)(2)(D), (4), 47 U.S.C. §§ 548(c)(2)(D), (4).

[38] *See Program Access Order*, 8 FCC Rcd at 3386. *See also NECN*, 9 FCC Rcd at 3234; *Time Warner Cable*, ("*Time Warner*"), 9 FCC Rcd 3221, 3225 (1994).

[39] *See Program Access Order*, 8 FCC Rcd at 3385.

[40] *Time Warner*, 9 FCC Rcd at 3225.

[41] Communications Act, §§ 628(c)(4)(A)-(B), 47 U.S.C. §§ 548(c)(4)(A)-(B).

[42] *NECN*, 9 FCC Rcd at 3235; *Time Warner*, 9 FCC Rcd at 3225.

[43] *Time Warner*, 9 FCC Rcd at 3226.

[44] *Time Warner*, 9 FCC Rcd at 3227, ¶ ¶ 37-38.

[45] *Time Warner*, 9 FCC Rcd at 3329, ¶ 52.

a new service.[46] All new programming services face similar difficulties in securing carriage commitments for the launch of a service and attracting financial backing which may be ameliorated by the ability of the programming vendor to offer exclusive distribution. However, exclusivity is a tool on which Congress has placed specific limits for vertically integrated programming vendors. Where a vertically integrated programming vendor demonstrates that it faces unique obstacles or limitations in attracting investments and securing carriage agreements for a new programming service, such that its viability requires the ability to offer the additional incentive of exclusivity, exclusive distribution may be in the public interest.[47]

24. We believe that NewsChannel has shown that its service differs from most programming services because each operator intending to carry the service must install equipment to receive the community-specific programming segments. Thus, operators intending to distribute the service must make a commitment of physical space at the headend and install and operate the equipment, which is not required for the launch of the typical new service. Moreover, the process of distributing the local news segments entails commitments from local newspapers that must be negotiated prior to launch on each system. We find that these unique technical and negotiation requirements for distribution of NewsChannel to each cable system create obstacles to financial viability of the programming service that may be ameliorated by the ability to offer cable operators exclusive distribution rights.

25. NewsChannel also asserts that in order to achieve financial security, the service must be distributed beyond Lenfest's own cable systems. NewsChannel presents evidence that a large cable operator in the area has conditioned carriage on the ability of /NewsChannel to grant exclusive distribution rights. NewsChannel argues that without distribution by this and other cable operators in the mid-Atlantic states NewsChannel will not be able to distribute the service widely enough to gain financial viability.

26. We conclude that given the technical requirements for carriage of the service on each cable system and the limited distribution potential, NewsChannel's launch beyond Lenfest systems will require the additional incentive of exclusivity to secure carriage commitments and to ensure financial viability. Thus, we find that the proposed exclusivity is necessary to assure the continued investment in this new programming service.

2. Diversity in Programming

27. The statutory factors set forth in the 1992 Cable Act for the public interest analysis include consideration of the effect of exclusivity on diversity in the programming market.[48] We believe that exclusivity may promote diversity in the programming market by providing incentives for cable operators to promote and carry a new and untested programming service. As we stated in *NECN*, to the extent it is consistent with the statute, our regulatory policy will encourage and promote new and innovative media partnerships.[49]

28. The ability to offer reasonably limited exclusive distribution rights to cable affiliates may be essential for the successful launch of NewsChannel and necessary for its financial survival. According to NewsChannel if such financial viability is not achieved, it is possible that the programming market may lose this regional news service. Thus, it appears that promoting the financial viability of this service by allowing exclusive distribution on a limited basis will foster the public interest in enhancing diversity of programming services.

29. In addition, we believe that the launch and introduction of a new and unique service, such as NewsChannel, increases the diversity of services available in the video programming market. As noted above, NewsChannel takes advantage of new and innovative technologies in ways that optimize the delivery of specialized services to cable subscribers. In addition, NewsChannel involves an innovative approach of using print media which also promotes diversity and increases the sources of information available to local cable subscribers. Thus, we conclude that the proposed exclusivity will enhance diversity in the programming market, which weighs in favor of granting NewsChannel's petition.

C. Duration of the Exclusive Agreement

30. The final public interest factor that we must consider is the duration of the contract.[50] Where the duration of the exclusivity is tailored to the minimum period of time reasonably necessary to develop and firmly establish the programming service then such limited duration may weigh in favor of allowing exclusive distribution by cable operators. Similarly, we believe that the geographic extent of the exclusivity proposed should be limited to that which reasonably is necessary to develop and to establish the viability of the programming service, while minimizing the effect on the development of competition in the relevant distribution markets.

31. With respect to the proposed duration of exclusivity, the Commission must also balance the benefits of exclusivity to the development and distribution of new, diverse programming against the overreaching goal of the program access rules to foster the development of competition in the distribution marketplace. Therefore, the duration of exclusivity must be limited to achieve the public interest benefits in allowing the programming vendor to develop a viable service, while at the same time limiting any potential disadvantage or hindrance to the growth of competitive MVPDs. NewsChannel states that it has requested the ability to provide exclusivity to its affiliates for seven years because that is the length of time needed to induce cable operators to carry the NewsChannel programming service. NewsChannel further justifies its request for a seven year term for exclusive distribution agreements based on the

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[46] Communications Act § 628(c)(4)(C), 47 U.S.C. § 548(c)(4)(C); *NECN*, 9 FCC Rcd at 3236; *Time Warner*, 9 FCC Rcd at 3228.

[47] *See, e.g., NECN*, 9 FCC Rcd at 3236. The programming service's distribution potential was limited by the regional focus of the programming, constraining its revenue potential. This limitation distinguished the service from other new launches and justified NECN use of exclusivity as a tool to attract financial investments and carriage commitments.

[48] *See* Communications Act § 628(c)(4)(D), 47 U.S.C. § 548(c)(4)(D).

[49] 9 FCC Rcd at 3237.

[50] Communications Act, § 628(c)(4)(E), 47 U.S.C. § 548(c)(4)(E).

Commission's grant of exclusivity for seven years to NECN. NewsChannel argues that it will take NewsChannel longer than it took NECN to develop its programming service because of the slow roll-out.

32. In the absence of any opposition from existing or potential competitors, we will not substitute another time period for that proposed by NewsChannel. We are satisfied that the seven year period is both appropriate and reasonable and that the public interest benefits to the programming marketplace from the exclusivity offset any potential effect to competing distributors. Thus, we believe that it is appropriate to allow NewsChannel to provide exclusivity to its cable affiliates for the proposed seven year period.

33. In *NECN*, the Commission limited NECN's ability to provide exclusive distribution rights to its cable affiliates to eighteen months in order to minimize the potential effects such exclusivity could have on competing distributors in the future. In *NECN*, the Commission held that the two to three years following its decision may be the most crucial time period during which NECN must establish itself among consumers in order to ensure its long term financial viability. At the time of the Commission's decision, NECN had been operational for two years and had almost one million cable subscribers. In contrast, NewsChannel was only recently launched on a test basis in one cable system. Moreover, due to the time needed to gain the rights to the newspaper source materials and the installation of special equipment, NewsChannel contends that it would be able to roll-out its programming service on only one or two systems per month. Given these distinctions, we believe that eighteen months may not be long enough for NewsChannel to establish itself among consumers. Instead, we believe that a period of four years is a reasonable period of time to allow NewsChannel the opportunity to establish itself as a viable service without unduly restricting competitors access to the programming necessary to compete effectively against incumbent cable operators.

34. We believe that NewsChannel has demonstrated a need to offer exclusivity to potential affiliates as an additional incentive to encourage investment and carriage negotiations over the next four years. However, we also determine that all exclusive distribution rights provided by NewsChannel to its cable affiliates must terminate seven years from the effective date of this *Order*. We conclude that limiting the duration of exclusivity in this manner, reasonably balances the public interest in promoting the development of competition in the distribution market against the public interest in promoting the financial viability of NewsChannel.

35. The geographic extent of the proposed exclusivity in this case is limited to the franchise areas of the cable systems located within the four mid-Atlantic states. Given the limited appeal and distribution potential of NewsChannel, we believe that the proposed extent of exclusivity is reasonable and adequately limited. Moreover, because there is no evidence that any MMDS operator or SMATV operator in this area is interested in carrying the service, the limited extent of the proposed exclusivity will not significantly effect access to NewsChannel by alternative distributors. Thus, we believe that exclusivity for an appropriate duration within the franchise areas of the cable systems in the four mid-Atlantic states is in the public interest.

D. Conclusion

36. We conclude that NewsChannel has demonstrated that its proposed exclusive distribution agreements to cable affiliates in the four mid-Atlantic states is in the public interest. NewsChannel has demonstrated that the proposed exclusive agreement provides an additional incentive to other cable operators to carry the service, thus, ensuring financial viability. We also find that the ability to offer exclusivity will ensure continued investment in and roll-out of the NewsChannel service, thereby promoting the diversity of programming available to subscribers in the video programming market. Moreover, NewsChannel has shown that the limited exclusivity will not have a significant limiting effect on the development of facilities-based competition in the mid-Atlantic distribution market. Thus, upon consideration of the five statutory public interest factors, we find that NewsChannel has met its burden of demonstrating that the statutory presumption that the public interest is served by requiring open access by emerging competing distributors to the NewsChannel service is offset by countervailing public benefits derived from allowing exclusive agreements in order to create incentives for investment in the development and distribution of the service that will promote diversity in the programming market. Thus, for four years from the effective date of this *Order*, we will allow NewsChannel to offer exclusive distribution to its cable affiliates within their franchise areas in the four mid-Atlantic states. All exclusive distribution rights provided by NewsChannel to cable affiliates must terminate seven years from the effective date of this *Order*.

V. ORDERING CLAUSE

37. Accordingly, IT IS ORDERED, that the petition for exclusivity filed by NewsChannel, a Division of Lenfest Programming Services, Inc., ("NewsChannel") requesting a finding that its proposed exclusive distribution agreements with cable affiliates is in the public interest IS GRANTED as set forth herein, and NewsChannel is hereby authorized to provide exclusive distribution rights to cable affiliates within their franchise areas in the four mid-Atlantic states for the next four years, so long as all such exclusive distribution rights terminate seven years from the effective date of this *Order*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones,
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Withdrawal of	MI0122 City of Midland
FCC Form 329	MI0174 Village of Cass City
Rate Complaints	MI0277 Village of Pentwater
Against C-TEC	MI0287 City of Greenville
Cable Systems	MI0319 Fruitland Township
	NU0366 Village of Bellaire
	MI0373 Village of Spring Lake
	MI0451 City of Reed City
	MI0455 City of Belding
	MI0568 Berlin Charter Township
	MI0619 Littlefield Township
	MI0655 Caledonia Charter Township
	MI0673 City of Rockford
	MI0674 Courtland Township
	MI0692 Richmond Township
	MI0693 City of Evart
	MI0700 City of Hudsonville

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1994; Released: December 19, 1994

By the Chief, Cable Services Bureau:

1. In each of the cases noted above, the local franchising authority (LFA) filed a complaint with this Commission alleging that the prices charged by C-TEC Cable Systems (C-TEC) for cable programming service tier (CPS) services in its community were unreasonably high. These complaints, and the local franchising authorities and filing dates, are noted at Attachment A. Between September 20 and November 10, 1994, many of these LFAs wrote to the Commission to withdraw their CPS complaints.[1] In each case, the LFA was the only complainant who filed with this Commission. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. The withdrawal of the only complaint against an operator's CPS rates in a community constitutes the termination of our jurisdiction to regulate those rates. We will allow the withdrawal of these complaints, and our review of these filings will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] In each case captioned above, C-TEC did file either an FCC Form 393 benchmark rate justification submission, or a cost of service rate justification submission.

4. This Commission has now received from each of the captioned local franchising authorities a letter stating that it wished to withdraw its CPS rate complaint against C-TEC. Under our rules, this Commission's authority to regulate CPS cable rates arises when a valid complaint against those rates is filed. In every case but one of those noted here, the LFA is the only complainant against this operator in this community.[9] Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[10] While our rules forbid collusive agreements between operators and local franchising authorities regarding forebearance from rate regulation, there is no evidence of such an agreement here. In many of these letters, in fact, the LFA states that it has completed a rate review of the basic rates, and has found them reasonable. It is on the basis of this finding of reasonableness, rather than on the basis of an underlying agreement to forebear, that these LFAs are seeking to withdraw their CPS rate complaints.

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[1] The dates of all withdrawal letters are noted in Attachment A.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*Benchmark Order*); 47 C.F.R. § 76.922(b).

[7] *See Benchmark Order*, 9 FCC Rcd at 4190, paras. 150-152.

[8] *Id.*

[9] The exception is City of Belding, MI0455, which has one subscriber complaint in addition to the three LFA complaints. C-TEC's benchmark rate justification for that community will be reviewed in our normal processes, although the LFA complaints are being withdrawn pursuant to this Order.

[10] Conference Report on the Cable Act of 1992, at 62. *See also*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) (*Rate Order*) at 5669.

We will accordingly allow these complainants to withdraw their complaints. Because our review of the rate justification showings is predicated on the existence of a rate complaint, in those instances where the operator no longer faces rate complaints in the above-noted communities, we are terminating our review of those filings.

5. Accordingly, IT IS ORDERED that permission to withdraw the FCC Form 329 rate complaints against cable programming service rates in the above-noted communities IS GRANTED, and the review of the resulting rate justification filings IS TERMINATED to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Attachment A

C-TEC CPS Complaint Withdrawals

CUID No., Local Franchising Authority	Complaints Filed[11]	Complaints Withdrawn
MI0122 City of Midland	10/12/93	10/25/94
MI0174 Village of Cass City	12/9/93	9/27/93
MI0277 Village of Pentwater	3/18/94[12]	9/23/93
MI0287 City of Greenville	11/12/93	9/21/94
MI0319 Fruitland Township	3/16/94	9/20/94
MI0366 Village of Bellaire	11/29/93	10/6/94
MI0373 Village of Spring Lake	11/18/93	10/12/94
MI0451 City of Reed City	12/9/93	10/3/94
MI0455 City of Belding	11/18/93	10/6/93[13]
MI0568 Berlin Charter Township	12/16/93	9/27/94
MI0619 Littlefield Township	3/28/94	10/4/94
MI0655 Caledonia Charter Township	11/12/93	9/23/94
MI0673 City of Rockford	11/12/93	10/11/94
MI0674 Courtland Township	2/28/94	10/5/94
MI0692 Richmond Township	11/16/93	9/20/94
MI0693 City of Evart	11/16/93	10/11/94
MI0700 City of Hudsonville	11/18/93	10/12/94

[11] The date given is the date the LFA first filed a complaint. In some cases, the LFAs filed duplicate complaints at later dates.
[12] This complaint was sent back as defective, and was not resubmitted. No other complaint was filed.
[13] As noted above, one complaint remains against CPS rates in Belding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Withdrawal of	MI0746 City of Gladwin
FCC Form 329	MI0749 Mills Township
Rate Complaints	MI0825 Wayland Township
Against C-TEC	MI0854 City of Stanton
Cable Systems	MI0944 Solon Township
	MI0945 City of Cedar Springs
	MI0960 Pentwater Township
	MI0971 Tallmadge Charter Township
	MI1018 Village of Howard City
	MI1174 City of Newaygo
	MI1211 Village of Lakeview
	MI1342 Leighton Township
	MI1542 Orleans Township
	MI1608 Solon Township
	MI1610 Robinson Township
	MI1622 Village of Morley
	MI1627 Reynolds Township

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 1994; Released: December 19, 1994

By the Chief, Cable Services Bureau:

1. In each of the cases noted above, the local franchising authority (LFA) filed a complaint with this Commission alleging that the prices charged by C-TEC Cable Systems (C-TEC) for cable programming service tier (CPS) services in its community were unreasonably high. These complaints, and the local franchising authorities and filing dates, are noted at Attachment A. Between September 20 and November 10, 1994, many of these LFAs wrote to the Commission to withdraw their CPS complaints.[1] In each case, the LFA was the only complainant who filed with this Commission. Our jurisdiction to regulate CPS rates arises with the filing of a valid complaint against those rates. The withdrawal of the only complaint against an operator's CPS rates in a community constitutes the termination of our jurisdiction to regulate those rates. We will allow the withdrawal of these complaints, and our review of these filings will therefore be terminated.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.

3. The Commission's original rate regulations took effect on September 1, 1993.[5] The Commission subsequently revised its rate regulations effective May 15, 1994.[6] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[7] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[8] In each case captioned above, C-TEC did file either an FCC Form 393 benchmark rate justification submission, or a cost of service rate justification submission.

4. This Commission has now received from each of the captioned local franchising authorities a letter stating that it wished towithdraw its CPS rate complaint against C-TEC. Under our rules, this Commission's authority to regulate CPS cable rates arises when a valid complaint against those rates is filed. In every case noted here, the LFA is the only complainant against this operator in this community. Our mandate is to "protect subscribers of any cable system that is not subject to effective competition from rates that exceed the rates that would be charged if such a system were subject to effective competition."[9] While our rules forbid collusive agreements between operators and local franchising authorities regarding forebearance from rate regulation, there is no evidence of such an agreement here. In many of these letters, in fact, the LFA states that it has completed a rate review of the basic rates, and has found them reasonable. It is on the basis of this finding of reasonableness, rather than on the basis of an underlying agreement to forebear, that these LFAs are seeking to withdraw their CPS rate complaints. We will accordingly allow these complainants to withdraw their complaints. Because our review of the rate justification showings is predicated on the exis-

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[1] The dates of all withdrawal letters are noted in Attachment A.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993) (Cable Act of 1992).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] Order in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[6] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119 (1994) (*Benchmark Order*); 47 C.F.R. § 76.922(b).

[7] *See Benchmark Order*, 9 FCC Rcd at 4190, paras. 150-152.

[8] *Id.*

[9] Conference Report on the Cable Act of 1992, at 62. *See also*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993) (*Rate Order*) at 5669.

tence of a rate complaint, and because in every case listed here, the operator no longer faces a rate complaint, we are terminating our review of those filings.

5. Accordingly, IT IS ORDERED that permission to withdraw the FCC Form 329 rate complaints against cable programming service rates in the above-noted communities IS GRANTED, and the review of the resulting rate justification filings IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Attachment A

C-TEC CPS Complaint Withdrawals

CUID No., Local Franchising Authority	Complaints Filed[10]	Complaints Withdrawn
MI0746 City of Gladwin	11/12/93	10/4/94
MI0749 Mills Township	11/12/93	10/10/94
MI0825 Wayland Township	11/16/93	10/3/94
MI0854 City of Stanton	11/18/93	10/6/94
MI0944 Solon Township	3/21/94	9/24/94
MI0945 City of Cedar Springs	11/18/93	9/26/94
MI0960 Pentwater Township	2/25/94	10/18/94
MI0971 Tallmadge Charter Township	11/23/93	10/19/94
MI1018 Village of Howard City	11/18/93	10/11/94
MI1174 City of Newaygo	11/16/93	9/27/94
MI1211 Village of Lakeview	11/12/93	9/26/94
MI1342 Leighton Township	? ? ?	10/13/94
MI1542 Orleans Township	11/18/93	9/22/94
MI1608 Solon Township	3/21/94	9/24/94
MI1610 Robinson Township	11/18/93	10/11/94
MI1622 Village of Morley	4/19/94	10/4/94
MI1627 Reynolds Township	3/30/94	10/6/94

[10] The date given is the date the LFA first filed a complaint. In some cases, the LFAs filed duplicate complaints at later dates.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Viacom	CUID Nos. CA0050, CA0051, CA0052,
Cable	CA0054, CA0166, CA0168
Marin County,	CA0352, CA0355, CA0361
California	CA0362, CA0363, CA0527

Benchmark Filing to Support
Cable Programming Service Price

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 1994; Released: December 21, 1994

By the Chief, Cable Services Bureau:

INTRODUCTION

1. Here we consider complaints about the price Viacom Cable ("Viacom") was charging for its cable programming service ("CPS") tier in the Marin County, California, communities designated by the CUID numbers referenced above.[1] Viacom has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Viacom's price only through May 14, 1994. At a later date we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

PROCEDURAL MATTERS

4. The first valid CPS complaints in the franchise areas addressed in this Order were completed and served on Viacom and received by the Commission on the dates set forth in Appendix A.[12]

5. Viacom filed an amended FCC Form 393 covering all of the franchise areas addressed in this Order with the Commission on June 27, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally.[13]

DISCUSSION

6. Viacom asserts that its monthly CPS tier price of $10.39 per subscriber is justified by its benchmark filing because its price is equal to the maximum permitted charge of $10.39 as calculated in the filing. However, upon review we have determined that Viacom has not correctly

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[1] According to Viacom, it has filed on a system-wide basis for CUID numbers CA0050, CA0051, CA0052, CA0054, CA0166, CA0168, CA0352, CA0355, CA0361, CA0362, CA0363 and CA0527 because it has been instructed to do so by the Marin County CATV Joint Powers Authority, the Local Franchising Authority that is certified to regulate rates for basic service and associated equipment and installations for these areas. Each of the communities designated by a CUID number is a separate franchise area. *See* Facsimile dated December 15, 1994 from Thomas F. Spike, Vice President of Finance, to Peter G. Wolfe.

[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Dimension has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) (*"Second Order on Reconsideration"*), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Viacom implemented its CPS price under the new regulations. See para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[12] We note that in South Sausalito, California, CUID No. CA0168, the first valid CPS complaint was received by the Commission on April 14, 1994. This complaint constituted a timely correction under Section 76.955 of our rules, 47 C.F.R. § 76.955, of a previous timely complaint that had been returned by the Commission pursuant to 47 C.F.R. § 76.954. For this reason, the corrected complaint is timely even though it was filed after the expiration of the limitation period set forth in 47 C.F.R. § 76.953(a).

[13] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

calculated its maximum permitted price, and it is therefore appropriate to make the following adjustment to Viacom's calculations in Form 393:

> a. In its amended filing of June 27, 1994, Viacom states that it calculated the Inflation Adjustment Factor (Form 393, Part II, Worksheet 1, Line 127, and Form 393, Part II, Worksheet 4, Line 401) using data it relied on when it set its $10.39 CPS price. If Viacom had done so correctly (i.e., if it had completed Form 393 with accurate data, including the most recent inflation data available as of the time it set its price), and if based on this data Form 393 indicated that its prices were reasonable, then Viacom would have successfully justified its prices under paragraph 94 of the *Third Order on Reconsideration*.[14] However, the figures Viacom used are not consistent with data on which it should have relied in setting its CPS price. Specifically, Viacom used data released by the U.S. Department. Department of Commerce on August 31, 1993, to complete Lines 122 and 125, but used earlier data to calculate the Inflation Factor on Line 123. Furthermore, Viacom claimed an Adjustment Time Period extending through October 1993 (Line 124), which is inconsistent with an attempt to justify rates based on August 1993 data. Viacom's calculation of the Inflation Adjustment Factor is thus incorrect.

We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Viacom filed.[15] On its amended Form 393, Viacom entered 13 months on Line 124, indicating that its filing was as of the end of October 1993. On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index (GNP-PI) figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate an Inflation Adjustment Factor through October 1993, the base date Viacom used in justifying its rates, of 1.030.

7. Because of this error, we conclude that Viacom has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustment discussed above. This adjustment has the effect of reducing the maximum permitted monthly CPS tier price from $10.39 (as Viacom calculated) to $10.22.

CONCLUSIONS

8. Upon review of the record herein, we conclude that Viacom's showing supports a maximum reasonable CPS tier price of $10.22 per month (plus franchise fee) for the period from the filing of the earliest complaint in each franchise area (as set forth on Appendix A) to May 14, 1994.[16] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

9. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the complaints referred to in Appendix A against the cable programming service price charged by Viacom Cable in Fairfax, California, CUID No. CA0050; Mill Valley, California, CUID No. CA0051; San Anselmo, California, CUID No. CA0052; Tiburon, California, CUID No. CA0054; Sausalito, California, CUID No. CA0166; South Sausalito, California, CUID 0168; Corte Madera, California, CUID No. CA0352; Larkspur, California, CUID No. CA0355; Ross, California, CUID No. CA0361; San Rafael, California, CUID No. CA0362; Marin County, California, CUID No. CA0363; and Belvedere, California, CUID No. CA0527 and all other complaints in these franchise areas related to the same price ARE GRANTED TO THE EXTENT INDICATED HEREIN.

10. IT IS FURTHER ORDERED, that the benchmark filing submitted by Viacom Cable with respect to Fairfax, California, CUID No. CA0050; Mill Valley, California, CUID No. CA0051; San Anselmo, California, CUID No. CA0052; Tiburon, California, CUID No. CA0054; Sausalito, California, CUID No. CA0166; South Sausalito, California, CUID CA0168; Corte Madera, California, CUID No. CA0352; Larkspur, California, CUID No. CA0355; Ross, California, CUID No. CA0361; San Rafael, California, CUID No. CA0362; Marin County, California, CUID No. CA0363; and Belvedere, California, CUID No. CA0527, for the period beginning with the filing of the first valid complaint in each franchise area and ending on May 14, 1994, as set forth on Appendix A, justifies a maximum price of $10.22 (plus franchise fee) for Viacom Cable's cable programming service tier.

11. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Viacom Cable shall refund to subscribers that portion of the amounts paid for cable programming service for the period from the filing of the first valid complaint in each franchise area (as set forth on Appendix A)[17] to May 14, 1994 which exceeded $10.22 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

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[14] *w P37IXP Third Order on Reconsideration*, MM Docket Nos. 92-266 and 92-262, FCC 94-40, 9 FCC Rcd 4316 (1994) (*"Third Order on Reconsideration"*).

[15] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[16] This finding is based solely on the representations of Viacom listed in paragraph 5, *supra*, and the modification described in paragraph 6, *supra*. Should information come to our attention that these representations were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[17] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission.47 C.F.R. § 76.961(b).

12. IT IS FURTHER ORDERED, that Viacom Cable shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 30 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Appendix A

CUID No.	Date First Complaint Filed with FCC	Date Complaint Served
0050	11/19/93	10/28/93
0051	11/26/93	11/19/93
0052	11/29/93	11/19/93
0054	11/15/93	10/29/93
0166	11/15/93	10/27/93
0168	4/14/94	2/25/94
0352	11/19/93	11/13/93
0355	11/22/93	11/15/93
0361	12/13/93	12/6/93
0362	11/29/93	11/17/93
0363	12/10/93	11/5/93
0527	11/17/93	11/5/93

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TWIN COUNTY TRANS
VIDEO, INC.
d/b/a TWIN COUNTY CABLE

Petition for Reconsideration

of Certification of
Township of Heidelberg, PA
to Regulate Basic Cable Service Rates
(PA1263)

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 1994; Released: December 21, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On May 19, 1994, Twin County Trans Video, Inc. d/b/a Twin County Cable ("Twin County") filed a timely Petition for Reconsideration challenging the certification of the Township of Heidelberg, Pennsylvania ("Township") to regulate rates for basic cable service and associated equipment.[1] On August 19, 1994, Twin County submitted its supplemental pleading in response to the Commission's July 29, 1994 Order.[2] Pursuant to a Commission inquiry, a clarifying letter was also filed August 29, 1994. The Township did not file an opposition to Twin County's petition.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[3] For purposes of theinitial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition, unless they have actual knowledge to the contrary.[4] Certification becomes effective 30 days from the date of filing unless the Commission finds that the franchising authority does not meet the statutory certification requirements.[5] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days from the date such certification becomes effective.[6] Rate regulation is automatically stayed pending review of a timely-filed petition for reconsideration alleging the presence of effective competition.[7]

II. DISCUSSION

Petitioner's Contentions

3. Twin County bases its challenge on the competing provider test for effective competition set forth in the 1992 Cable Act and our rules.[8] Twin County argues that its system serving the Township is subject to effective competition because its franchise area is: 1) served by itself and Blue Ridge Cable Television, Inc. ("Blue Ridge"), an unaffiliated multichannel video programming distributor ("MVPD") and that each of them offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to Twin County, the smaller operator, exceeds 15 percent of the households in the franchise area.

4. Twin County states that there are 1,089 "homes" in Heidelberg Township, the franchising area. Twin County states that its cable system passes 653 of the 1,089 "homes," or 60 percent of the total number of "homes." In addition, Twin County states that it serves 227 of the 1,089 "homes" or 21 percent of the total number of "homes." Twin County submits 1990 Census information[9] applicable to the Township which indicates that there are 1,089 total "housing units" in Heidelberg Township.[10] In addition, Twin County submits a computer generated print-out stating that it passes 653 homes in the franchise area. This same print-

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[1] The Township filed its "Certification of Franchising Authority to Regulate Basic Cable Service rates and Initial Finding of Lack of Effective Competition" on March 22, 1994, which became effective on April 21, 1994.

[2] *Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) (*"Effective Competition Order"*).

[3] Communications Act of 1934 § 623(a)(4), 47 U.S.C. §543(a)(4).

[4] 47 C.F.R. §§76.906, 76.910(b)(4).

[5] 47 C.F.R. §76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, or personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. 47 C.F.R. §76.910(b). *See also* 47 U.S.C. §543(a)(4).

[6] 47 C.F.R. §§1.106, 76.911. *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[7] 47 C.F.R. §76.911(c).

[8] The 1992 Cable Act (Communications Act of 1934 § 623(a)(2), 47 U.S.C. § 543(a)(2)) and the Commission's rules (47 C.F.R. § 76.905(a)) provide that only the rates of cable systems that are not subject to effective competition may be regulated. One of the basis on which a cable system is deemed subject to effective competition is if the franchise area is: 1) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and 2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area. Communications Act of 1934 § 623(1)(1)(B); 47 U.S.C. §543(l)(1)(B); 47 C.F.R. §76.905(b)(2).

[9] As the Bureau stated in the *Effective Competition Order*, the 1990 Census is an appropriate source for household data. *Effective Competition Order, supra*.

[10] "Housing units" are not the same as "households," the term used in the Cable Act and the Commission's rules. The count of

out demonstrates that Twin County serves 227 subscribers. Finally, Twin County provides 51 channels of programming, including at least 32 non-broadcast channels.[11]

5. With respect to Blue Ridge, Twin County states that Blue Ridge passes 800 of the 1,089 "homes" or 73 percent of the total number of "homes" in the franchise area. In addition, it states that Blue Ridge serves 662 of the 1,089 "homes," or 61 percent of the total number of "homes." As support, Twin County submits a letter from Blue Ridge, in which Blue Ridge states that its cable system in Heidelberg passes 800 and serves 662 of the 1089 "homes."[12] In addition, Blue Ridge offers 56 channels of video programming, including at least 41 non-broadcast channels.[13]

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[14] The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905 of the Commission's rules, is present within its franchise area.[15] Based on the totality of the evidence presented, we find that Twin County has met this burden.

Disposition of Twin County's Competitive Provider Effective Competition Claim

7. The first prong of the competitive providers test for effective competition requires that the franchise area be served by at least two unaffiliated MVPDs, each of which offers comparable programming to at least 50 percent of the households in the franchise area.[16] Twin County asserts that it passes 60 percent of the 1,089 "homes" in the franchise area and that Blue Ridge passes 73 percent of the 1,089 "homes" in the franchise area. The 1990 Census data submitted by Twin County shows that there are 1,089 total housing units (i.e. occupied and unoccupied housing units), including 1,051 households (i.e. occupied housing units) in the franchise area. Twin County acknowledges that the term "homes" as used by Twin County refers to total housing units, not to households.[17] Our rules, however, require the number of households to serve as the reference point for purposes of gauging effective competition under this test, just as it is required under the low penetration test.[18] However, we recognize that determining the number of households (i.e. occupied housing units) which are passed by a cable operator, as opposed to the number which exist in the franchise area, may not be easily accomplished. Such information is not provided by the Census data we routinely urge operators to rely upon for purposes of the low penetration test, and we understand that such information may not generally be available to, or collected by, operators. Because we are concerned to identify franchise areas which are subject to effective competition between or among providers, we will examine the totality of the evidence submitted by Twin County to see if conclusions can be drawn from it about the percentage of households passed by Twin County and Blue Ridge.

8. As stated earlier, the 1990 Census data submitted by Twin County indicates that there are 1,089 total housing units and 1,051 households in the franchise area. Twin County states that it passes 653 "homes" in the franchise area. If we compare the total number of households with the total number of housing units, we find that 38 housing units, or approximately 3.5 percent of total housing units, were unoccupied. If we reduce the number of "homes" passed by Twin County by 3.5 percent, we arrive at a rough household number of 630. This number is about 60 percent of the total households in the franchise area. Alternatively, if we assume as a worst case that Twin County passes all of the unoccupied housing units in the franchise area, and so subtract 38 from 653, we are left with a total of 615 households passed, which is 58.5 percent of total households. Under either scenario, the evidence permits us to conclude that Twin County passes more than 50 percent of the households in the franchise area.

9. Turning to Blue Ridge, Twin County submits a letter from Blue Ridge stating that Blue Ridge passes 800 "homes and serves 662 subscribers in the franchise area."[19] Our calculations show that 662 subscribers represents 63 percent of the total households in the franchise area. Therefore, Blue Ridge clearly passes more than 50 percent of the households in the franchise area. Thus, the evidence permits us to conclude that both Twin County and Blue Ridge pass more than 50 percent of the households in the franchise area.

10. With regard to the issue of programming comparability, we find that the programming of the two operators are comparable. We note that each operator offers over 50

"households" in the 1990 Census reflects only occupied housing units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 Census of Population, CP-1-1B, Appendix B at B-8. "Housing units" reflect occupied and unoccupied units.

[11] *See* Supplement to Petition for Reconsideration filed by Blue Ridge Cable Television (August 18, 1994) ("Blue Ridge Supplement"). Competing MVPDs must offer comparable video programming to households in the franchise area. *See* 47 C.F.R. §76.905(b)(2). As the Commission has stated previously, in order to provide "comparable" video programming, a MVPD must provide at least 12 channels of video programming, including at least one non-broadcast channel. *See Rate Order*, at 5667. In support of its own effective competition claim, Blue Ridge submitted channel line-ups for itself and Twin County.

[12] Section 76.911(b)(2) of the Commission's rules authorizes a cable operator to request from a competitor information regarding the competitor's reach and subscribership, and requires the competitor to respond. The response, however, may be limited to simply a statement of numerical totals. *See* 47 C.F.R. §76.911(b)(2).

[13] *See* Blue Ridge Supplement, *supra*.

[14] 47 C.F.R. §76.906.

[15] 47 C.F.R. §76.911(b)(1).

[16] Communications Act of 1934 § 623(l)(1)(B), 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. §76.905(b)(2)(i).

[17] In its August 29, 1994 response, Twin County states that its "homes passed" figure -includes both occupied and vacant units.

[18] *See* Communications Act of 1934 § 623(l)(1)(A), 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. §76.905(b)(1) (measuring low penetration effective competition by percentage of households subscribing to cable in the franchise area); Communications Act of 1934 § 623(l)(1)(B), 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. §76.905(b)(2) (measuring direct effective competition by percentage of households passed and percentage of households subscribing to cable in the franchise area).

[19] Blue Ridge asserts in its letter to Twin County that the figure of 800 "homes passed" was taken directly from Blue Ridge's Form 325A filed with the Commission.

channels with more than 30 non-broadcast channels[20] -- this satisfies the Commission's programming comparability criteria.[21]

11. With regard to the second prong of the competitive providers effective competition test, we find that the evidence shows that more than 15 percent of the households in the franchise area subscribe to multichannel video programming distributor other than from Blue Ridge, the franchise area's largest MVPD.[22] Here, Twin County has submitted sufficient evidence that Twin County, the smaller of the two competitors, serves 227 subscribers out of the 1,051 households, or 21.4 percent of total households.

12. As Twin County has submitted sufficient evidence demonstrating that its cable system serving Heidelberg Township is subject to effective competition from another cable operator, its petition is granted.

III. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Twin County Trans Video, Inc. d/b/a Twin County Cable challenging the Certification of the Township of Heidelberg, Pennsylvania IS GRANTED.

14. IT IS FURTHER ORDERED that the certification of the Township of Heidelberg, Pennsylvania to regulate the basic cable rates of Twin County Trans Video, Inc. d/b/a Twin County Cable IS RESCINDED.

15. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules.[23]

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[20] *See* n.11 and 13, *supra*.
[21] *See* n.11, *supra*.
[22] As Blue Ridge serves 60 percent of the total number of households, while Twin hhCounty serves 21.4 percent, it is clear that Blue Ridge is the largest of the two competitors.
[23] 47 C.F.R. §0.321.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Authority to Issue
Subpoenas

ORDER

Adopted: December 13, 1994; Released: December 21, 1994

By the Commission:

1. Section 409(e) of the Communications Act of 1934, as amended (Act), 47 U.S.C. § 409(e), grants the Commission express authority to require by subpoena information relating to any matter under investigation. This authority may be delegated in accordance with Section 5(c)(1) of the Act. 47 U.S.C. § 155(c)(1). The agency's power of subpoena is not confined to those over whom it exercises regulatory jurisdiction, but extends to private individuals and entities over whom it does not.[1]

2. We find that the delegation of authority to the Chief, Common Carrier Bureau, to issue administrative subpoenas in the investigation of matters involving any alleged violation or violations of Title II of the Act[2] will facilitate investigations of unlawful activity by common carriers and is, therefore, in the public interest.

3. Accordingly, IT IS ORDERED, that, pursuant to Section 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(1), authority is delegated to the Chief, Common Carrier Bureau, to require by administrative subpoena the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, schedules of charges, contracts, agreements, and any other records deemed relevant to the investigation of common carriers for any alleged violation or violations of Title II of the Act.

4. IT IS FURTHER ORDERED that Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, be amended to add a subsection (j) to reflect this delegation of authority. This amendment of the Commission's rules is contained in Appendix A of this Order. The requirement of notice and comment rule making contained in 5 U.S.C. § 553(b) and the effective date provisions of 5 U.S.C. § 553(d) do not apply since this amendment concerns matters of agency organization, procedure, or practice. *See* 5 U.S.C. §§ 553(b)(A), 553(d).

5. IT IS FURTHER ORDERED that this amendment of Section 0.291, as set forth in the Appendix, is EFFECTIVE upon the date of publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Title 47 of the Code of Federal Regulations, Part O, is amended as follows:

Part O

1. Authority for Part O of Title 47 of the Code of Federal Regulations continues to read as follows:

Authority: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.291 is amended by adding subjection (j) to read as follows:

§ 0.291 Authority Delegated

(j) *Authority concerning the issuance of subpoenas.* The Chief of the Common Carrier Bureau or her/his designee is authorized to issue subpoenas for the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, schedules of charges, contracts, agreements, and any other records deemed relevant to the investigation of common carriers for any alleged violation or violations of Title II of the Communications Act of 1934, as amended.

[1] *See FCC v. Cohn*, 154 F. Supp. 899 (S.D.N.Y. 1957).
[2] *See* 47 U.S.C. §§ 201-228.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: January 20, 1995

IN THE MATTER OF PACIFIC TELECOM, INC., PETITION FOR WAIVER OF DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, APPENDIX-GLOSSARY OF THE COMMISSION'S RULES AAD 94-149

Comment Date: February 20, 1995
Reply Date: March 6, 1995

On October 28, 1994, Pacific Telecom, Inc. ("PTI"), on behalf of its telephone operating subsidiaries, North-West Telephone ("NW Tel") and Sullivan Telephone Company ("Sullivan"), filed a petition for waiver of the definition of "Study Area" as set forth in Part 36, Appendix-Glossary of the Commission's rules. This waiver would allow the petitioners to reflect changes in their study area boundaries that would result from the consolidation of the NW Tel study area with the study area of Sullivan in connection with the merger of these two companies. PTI states that it has discussed the merger with the Wisconsin Public Service Commission ("WPSC") and both parties have determined that WPSC approval is not necessary.

Interested parties may file comments on this petition on or before **February 20, 1995**, and reply comments on or before **March 6, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should also reference AAD 94-149. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Accounting and Audits Division, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C., 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for the purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R.§§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: January 20, 1995

IN THE MATTER OF PACIFIC TELECOM, INC., PETITION FOR WAIVER OF DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, APPENDIX-GLOSSARY OF THE COMMISSION'S RULES AAD 94-148

Comment Date: February 20, 1995
Reply Date: March 6, 1995

On October 28, 1994, Pacific Telecom, Inc. ("PTI"), on behalf of its telephone operating subsidiaries, Wayside Telephone Company ("Wayside"), Footville Telephone Company ("Footville"), Shell Lake Telephone Company, Inc. ("Shell Lake"), and Turtle Lake Telephone Company, Inc. ("Turtle Lake"), filed a petition for waiver of the definition of "Study Area" as set forth in Part 36, Appendix-Glossary of the Commission's rules. This waiver would allow the petitioners to reflect changes in their study area boundaries that would result from the consolidation of the Wayside study area with the study areas of Footville, Shell Lake, and Turtle Lake in connection with the merger of these four companies. PTI states that it has discussed the merger with the Wisconsin Public Service Commission ("WPSC") and both parties have determined that WPSC approval is not necessary.

Interested parties may file comments on this petition on or before **February 20, 1995**, and reply comments on or before **March 6, 1995**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should also reference AAD 94-148. Four (4) copies should also be sent to Adrian Wright, Cost Analysis Branch, Accounting and Audits Division, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C., 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for the purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1208-1.1216. For further information contact Adrian Wright at (202) 418-0830.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

DA 94-35

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

January 10, 1994

PRIVATE RADIO BUREAU CLARIFIES PROCEDURES FOR GRANDFATHERED 929-930 MHZ PAGING OPERATORS TO QUALIFY FOR EXCLUSIVITY

By this Public Notice, the Private Radio Bureau clarifies the procedures that will apply to 929-930 MHz applicants and licensees who are seeking exclusivity for "grandfathered" systems.

On October 21, 1993, the Commission adopted a Report and Order to grant channel exclusivity to qualified local, regional, and national paging systems at 929-930 MHz. Report and Order, PR Docket No. 93-35, FCC 93-479 (adopted October 21, 1993, released November 17, 1993). The Report and Order provided that incumbent licensees authorized under the prior rules would receive exclusivity on a grandfathered basis if they can demonstrate compliance with the new exclusivity requirements. On November 19, 1993, the Commission issued a Public Notice requiring incumbents to submit requests for designation of exclusive status to NABER no later than January 28, 1994. DA 93-1411, November 19, 1993.

The Report and Order provides that licensees who have not yet constructed their facilities may qualify for exclusivity on a conditional basis, but must demonstrate within eight months that they have constructed a qualifying system or exclusivity will be forfeited. We wish to clarify that in the case of incumbents who request exclusivity based on grandfathered licenses or applications (i.e., licenses granted or applications filed prior to October 14, 1993), the eight-month deadline for demonstrating compliance with our exclusivity requirements will run from the date that the Commission issues a public notice conditionally designating the incumbent's system as exclusive. This deadline does not affect the construction period authorized under any individual license.

The Commission will provide public notice of each incumbent's conditional designation as an exclusive system only after NABER has reviewed the information submitted to it and provided its exclusivity recommendations to the Commission. Where an applicant's exclusivity request is based on pre-October 14 applications that are pending but not yet granted, the designation of exclusivity will occur when the last such application is granted.

For further information, please contact NABER at (703) 739-0300 (Contact: Don Vasek), or the Private Radio Bureau Consumer Assistance Branch, (717) 337-1212.

--FCC--

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-369

April 18, 1994

STATUS OF REFARMING OF PRIVATE LAND MOBILE BANDS BELOW 512 MHZ (PR Docket No. 92-235)

On November 6, 1992, the Commission released a Notice of Proposed Rule Making in PR Docket No. 92-235 (Notice) proposing major policy changes and various other technical and operational rule changes for the private land mobile bands below 512 MHz. In addition, the Notice proposed a new Part 88 of the Commission's Rules to replace and simplify Part 90. On March 1 and May 6, 1993, the Private Radio Bureau sponsored public panel discussions between the Bureau and industry to exchange views on the many issues involved in this Notice. The comment period for the Notice closed on July 30, 1993. Comments generally favor improving operating efficiency in those bands, but differ on how to best achieve this goal.

The Private Radio Bureau recognizes the need to proceed as expeditiously as possible so that the millions of licensees of private land mobile radio systems can make equipment decisions based on full and accurate information. For a number of reasons, particularly the complexity of the issues involved in this huge proceeding, we have been unable to act as quickly as we had hoped. Although this project is still very much a high priority and is expected to be completed by the end of this summer, we are concerned that the decisions we make be ones that appropriately satisfy our public interest obligations. As the final rules in this proceeding have been delayed, however, we are becoming increasingly concerned that private land mobile licensees are being put in a very difficult position with respect to long-range radio system planning decisions. For example, we are aware that many licensees are being strongly encouraged by equipment dealers and others to buy new radio equipment now because of an assumption that they will have to vacate their current channel assignments or replace their existing equipment by 1996. This is not the case. No licensees will be forced off current channel assignments in 1996 as a result of the refarming issue. In fact, no decisions have yet been finalized on how to proceed on refarming and adequate equipment amoritization periods are contemplated. The Notice proposed that any new equipment purchased by private land mobile licensees before the effective date of any new rules would be able to be used for many years. While licensees are free to make decisions to move to other available frequencies or frequency bands, the Notice did not propose to force

any licensee to vacate a current channel assignment or move to an alternative frequency band as part of the refarming proceeding.

Any questions on refarming may be addressed to Dr. Doron Fertig, Policy and Planning Branch, Private Radio Bureau, at (202) 632-6497, or Eugene Thomson, Rules Branch, Private Radio Bureau, at (202) 634-2443.

--FCC--

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

DA 94-152

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

February 15, 1994

Comments Requested on American Automobile Manufacturers Association Late-Filed Comments on General Motors Research Corporation Petition for Rule Making (RM-8308)

On August 2, 1993, the Commission requested comments on a Petition for Rule Making filed by General Motors Research Corporation (RM-8308). This petition requested amendment of Parts 2 and 15 of the Commission's rules to permit use of the 76-77 GHz band for vehicular radar systems. Comments were due on September 1, 1993, and reply comments were due September 16, 1993.

On February 4, 1994, the American Automobile Manufacturers Association (AAMA) filed comments in this proceeding, along with a Motion for Acceptance of Late-Filed Comments.

It has been determined that AAMA's comments raise new issues that warrant giving interested parties an additional opportunity for comment. Specifically, these comments address the spectrum requirements and technical standards for vehicular radar systems.

Pursuant to Sections 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(j) and 303(r), we are hereby soliciting additional comment in RM-8308 on the issues raised by AAMA. The AAMA comments are available for inspection as part of the record in RM-8308 during normal business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, DC. A copy of the AAMA comments may also be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, N.W., Room 246, Washington, DC 20554, telephone (202) 857-3800.

Comments on these additional issues must be filed on or before **February 25, 1994.** Reply comments must be filed on or before **March 4, 1994.** To file formally in this proceeding, you must file an original and four copies of all comments and reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments in this proceeding, including those filed in response to this Public Notice, are available for public inspection during regular business hours in the FCC Reference Center.

By the Chief Engineer.

For additional information about this matter, contact Dave Wilson, Technical Standards Branch, Office of Engineering and Technology, FCC, telephone (202) 653-8138.

- FCC -

Before the
FEDERAL COMMUNICATIONS COMMISSION DA 94-470
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 17	)	
of the Cable Television	)	ET Docket No. 93-7
Consumer Protection and	)	
Competition Act of 1992	)	
	)	
Compatibility Between	)	
Cable Systems and Consumer	)	
Electronics Equipment	)	

ERRATUM

Released: May 13, 1994

By the Chief Engineer:

1. This Erratum corrects several inadvertent errors in the First Report and Order in ET Docket No. 93-7, FCC 94-80 (released May 4, 1994). In this regard, the fourth sentence of paragraph 72 is corrected to read as follows:

> 72. * * * In response to Greater Media's request regarding a caution to subscribers about changes in the operation of remote controls if the cable operator changes set-top boxes, we note that, as indicated above in paragraph 63, we are prohibiting cable operators from changing the infrared codes used to operate the remote control capabilities of the set-top devices they employ. * * *

2. The fifth sentence of paragraph 77 is corrected to read as follows:

> 77. * * * First, we are making the prohibition on scrambling of signals carried on the basic tier of service effective July 31, 1994. * * *

(We note that the rules contained in the original text released May 4, 1994, were correct regarding this matter and therefore are not being modified.)

3. Appendix A is corrected by deleting the last sentence of subparagraph (e)(2)(*iii*) of Section 76.630 of the rules to read as follows:

§76.630 Compatibility with consumer electronics equipment.

* * * * *

(e) * * *

(2) * * *

(iii) In cases where cable system operators offer remote control capability with cable system terminal devices and other customer premises equipment that is provided to subscribers, they shall advise their subscribers that remote control units that are compatible with that equipment may be obtained from other sources, such as retail outlets. Cable system operators shall also provide a representative list of the models of remote control units currently available from retailers that are compatible with the customer premises equipment they employ. Cable system operators are required to make a good faith effort in compiling this list and will not be liable for inadvertent omissions. This list shall be current as of no more than six months before the date the consumer education program is distributed to subscribers. Cable operators are also required to encourage subscribers to contact the cable operator to inquire about whether a particular remote control unit the subscriber might be considering for purchase would be compatible with the subscriber's customer premises equipment.

* * * * *

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley

Thomas P. Stanley
Chief Engineer

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN REPLY REFER TO:

DA 94-522

May 19, 1994
Released: May 23, 1994

America's Talking c/o
Mr. Arthur H. Harding, Esq.
Fleishman and Walsh
1400 Sixteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Harding:

This letter is in response to your May 9, 1994 inquiry on behalf of NBC seeking clarification and waiver of the Commission's rate regulations as applied to the launch of the America's Talking programming service, which we understand is scheduled to be launched on July 4, 1994.

Your letter refers to our letter dated April 19, 1994 with respect to Fox's proposed launch of a new channel on June 1, 1994.[1] Your letter requests clarification that the waiver granted to Fox's new programming service, fX, "applies equally to America's Talking, and that operators adding America's Talking on July 4, 1994 can immediately begin to recover any incremental increases in programming costs incurred thereby, and will not have to wait until the start of the fourth quarter before beginning to recover such costs."

Under Section 76.922(d)(3)(iii) of the Commission's rules, "[r]ate adjustments made to reflect changes in external costs shall be based on any changes in those external costs that occurred from the end of the last quarter for which an adjustment was previously made through the end of the quarter that has most recently closed preceding the filing of the FCC Form 1210" (emphasis added). Thus, the charges you describe in your letter would not be permitted under our rules to be passed through to subscribers prior to October 1, 1994.

In our letter regarding fX, we concluded that, in fairness

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[1] See In re fX Channel (released April 20, 1994, Cable Services Bureau) and In re fX Channel (released April 22, 1994, Cable Services Bureau) (clarifying impact of 47 C.F.R. Section 76.922 on the June 1, 1994 launch of fX).

to FX and other new programming services that had pre-existing commitments to launch between March 30, 1994 and July 14, 1994, operators should be permitted to recover the programming costs of such a new service that are incurred prior to July 1, 1994. We indicated that such program services have already expended considerable resources in preparing to launch their channels, and their decisions clearly were made before our rules were announced. We thus permitted operators to include in their permitted rates the costs incurred as a result of carriage of these program services prior to July 1, 1994.

We limited this waiver to allow the recovery of costs incurred when operators add a new programming service under the circumstances specified in the letter. We believe that a waiver was appropriate in the transitional situation faced by fX in order to maintain incentives for operators to add previously-planned program channels during the quarter in which our rules became effective. In addition, it will help ensure that programmers are not prejudiced by launch date decisions arrived at before the release date of the Commission's orders.

We believe that the situation described in your letter is similar to that considered in the letter concerning the launch of fX. We understand that the July 4, 1994 launch of America's Talking was formally announced on February 9, 1994, well before the release of our rules. Significant resources have been devoted to the planned launch date. Similarly, you state that the only difference between this case and that of fX "is that fX had a pre-existing scheduled launch date during the second quarter of 1994, and America's Talking has a pre-existing scheduled launch date during the third quarter of 1994, but both are scheduled for launch prior to July 14," 1994.

Accordingly we waive Section 76.922(d)(3)(iii) of our rules to permit operators to pass through the costs of America's Talking and other similarly situated programming services during the third quarter.[2] This decision is limited to the circumstances specified herein and is subject to the same

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[2] We also determine that the clarification of our rules requiring 30 days written notice to subscribers of the addition of new services during the deferral period set out in our May 6, 1994 letter regarding fX should also apply to the launch of America's Talking. Thus, we permit notice of the launch through on-screen and newspaper announcements by operators who are unable through reasonable efforts to provide the required notice as part of their regularly scheduled subscriber mailings, subject to the same limitations and requirements set out in our May 6, 1994 letter. See In re fX Channel (released May 9, 1994, Cable Services Bureau).

limitations and considerations set out in the April 19, 1994 letter regarding fX.

Very truly yours,

Kathleen M.H. Wallman
Acting Chief
Cable Services Bureau

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94- 557

RELEASED: June 1, 1994

QUESTION POOL RELEASED FOR GLOBAL MARITIME DISTRESS AND SAFETY SYSTEM (GMDSS) RADIO OPERATOR LICENSE EXAMINATION

The FCC today released the question pool for Commercial Radio Operator written examination Element 7. Passing Element 7, in addition to the previously released Element 1, is a requirement for a GMDSS Radio Operator License.

Copies of released question pools are available through the Commission's duplicating contractor, International Transcription Services, Inc., 2100 M Street, N.W., Washington, DC 20037 (202) 857-3800. Copies are not available from the FCC. A printed copy of each released element is available for viewing during business hours in the Special Services Division, Rm. 5322, 2025 M Street NW, Washington, DC. (202) 632-7197, and in the Public Reference Room, Licensing Division, 1270 Fairfield Road, Gettysburg, PA (717) 337-1212.

Commercial Operator License Examination Managers must use questions from these question pools when preparing the question sets they administer to examinees. Each pool contains at least five times the number of questions that are asked on one question set. The minimum passing score for Element 7 is 57 correct answers on a 76 question set.

Question pools for other written examination elements will be released by Public Notice as they are compiled.

For further information, call Ms. J. Joy Alford at (202) 632-4964.

- FCC -

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-558

RELEASED: June 1, 1994

QUESTION POOL RELEASED FOR SHIP RADAR ENDORSEMENT EXAMINATION

The FCC today released the question pool for Commercial Radio Operator written examination Element 8. Passing Element 8 is a requirement for a Ship Radar Endorsement.

Copies of released question pools are available through the Commission's duplicating contractor, International Transcription Services, Inc., 2100 M Street, N.W., Washington, DC 20037 (202) 857-3800. Copies are not available from the FCC. A printed copy of each released element is available for viewing during business hours in the Special Services Division, Rm. 5322, 2025 M Street NW, Washington, DC. (202) 632-7197, and in the Public Reference Room, Licensing Division, 1270 Fairfield Road, Gettysburg, PA (717) 337-1212.

Commercial Operator License Examination Managers must use questions from these question pools when preparing the question sets they administer to examinees. Each pool contains at least five times the number of questions that are asked on one question set. The minimum passing score for Element 8 is 38 correct answers on a 50 question set.

Question pools for other written examination elements will be released by Public Notice as they are compiled.

For further information, call Ms. J. Joy Alford at (202) 632-4964.

- FCC -

Before the
FEDERAL COMMUNICATIONS COMMISSION DA 94-592
Washington, D.C. 20554

In the Matter of	)
	)
Emergency Petition for Limited	)
Extension of Refund Liability	)
Deferral Period for Small	)
Operators and Small Systems	)

ORDER

Adopted: June 7, 1994 **Released:** June 7, 1994

By the Chief, Cable Services Bureau:

1. On May 27, 1994, the Small Cable Business Association ("SCBA") filed an Emergency Petition for Limited Extension of Refund Liability Deferral Period for Small Systems and Small Operators. In its petition, SCBA requests that the Commission extend the refund liability deferral period from July 14, 1994 to September 1, 1994 for operators with fewer than 15,000 subscribers and for systems with fewer than 1,000 subscribers that are owned by small MSOs under the Commission's regulations.[1]

2. SCBA's request for an extension of the refund liability deferral period for small systems and small operators, as defined above, would afford such systems, if regulated, additional time in which to comply with the Commission's revised rate rules, and if unregulated, additional time to evaluate the prospective effect of the Commission's rules if they are regulated in the future. SCBA contends that the extension it seeks would result in a smoother implementation of the Commission's rules for both small operators and their subscribers. It also argues that grant of its request for an extension would not compromise consumers' interests, since, under the Commission's rules for transition relief, small operators are required to cap their rates at their March 31, 1994 levels until completion of the Commission's study of prices and costs experienced by these operators.

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[1] A "small operator" is a system owned by an operator that has a total subscriber base of 15,000 or fewer subscribers as of March 31, 1994. 47 C.F.R. Section 76.922(b)(4)(A)(ii). "Small MSOs" are those multiple system operators that serve 250,000 or fewer total subscribers, own only systems with less than 10,000 subscribers each, and have an average system size of 1,000 or fewer subscribers. 47 C.F.R. Section 76.922(b)(5)(A).

3. In the Second Order on Reconsideration,[2] the Commission permitted systems that could not conform their regulated rates to the revised rate regulations by May 15, 1994, the effective date of the Commission's revised rules, an additional 60 days to comply, assuming certain conditions were met.[3] The Commission recognized that certain systems would have difficulty complying with the Commission's revised regulations by the effective date of the new rules.

4. Given their more limited resources, the Bureau recognizes that small operators may experience this difficulty even more acutely. In light of the special circumstances faced by these small operators, a waiver of 47 C.F.R. Section 76.922(b)(6)(B) to extend the refund liability deferral period to September 1, 1994 for such operators would ease the burden of, and allow them the necessary time to comply with, the Commission's rules.[4] Specifically, under this deferral, small operators would not be required to unbundle their equipment charges until September 1, 1994, which would afford these small operators additional time to comply with the Commission's transition treatment rules.[5] In addition, we believe that

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[2] Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket 92-266, FCC 94-38 (adopted February 22, 1994) ("Second Order on Reconsideration").

[3] See 47 C.F.R. Section 76.922(b)(6)(B). In order to take advantage of the refund liability deferral period, a cable operator must 1) not change the rate for, or restructure, any regulated program service or equipment offering between March 31, 1994 and July 14, 1994, and 2) establish a permitted rate under the Commission's revised rules by July 14, 1994.

[4] See WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

[5] See 47 C.F.R. Section 76.944(b)(4)(A)(iii). We also note that under the Commission's rules for computing refund liability, revenue neutral adjustments of equipment and programming to achieve unbundled equipment rates will not trigger refund liability. See 47 C.F.R. Section 76.942. Thus, even if a small operator had been charging, for example, higher charges for equipment than permitted under the Commission's revised rules, the operator would not incur refund liability since refund liability is calculated based on the difference between the old bundled rates and the sum of the new unbundled program service charges and the new unbundled equipment charges.

Small operators will have 30 days from September 1, 1994, the last date of the extended refund liability deferral period, to submit relevant FCC forms. Small operators must additionally

subscribers' interests will not be compromised by grant of the requested extension to systems owned by small operators in that the transition rate for such systems is their March 31, 1994 rate as determined in accordance with the Commission's prescribed forms and with certain permissible adjustments.[6] As such, a waiver of the July 14, 1994 termination date of the refund deferral period for small operators will not harm consumers obtaining service from such small operators.[7] Accordingly, we will grant the SCBA's petition with respect to small operators.[8]

5. The Bureau will not make this treatment available to small systems other than those owned by small operators. Unlike small systems owned by small operators, small systems owned by MSOs with more than 15,000 subscribers may be required to make some competitive rate reductions even if they qualify for low-

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provide advance notice of any rate restructuring taking place on or before September 1, 1994, in accordance with the Commission's notice requirements. See 47 C.F.R. Section 76.964. This is consistent with the Commission's treatment of other operators taking advantage of the refund liability deferral period until July 14, 1994. See Second Order on Reconsideration at n.190.

[6] See 47 C.F.R. Section 76.922(c) and (d).

[7] Subscribers of small operators will not be harmed by an extension of the refund liability deferral period until September 1, 1994 for several reasons. As stated, the transition rates for such systems are their March 31, 1994 rates. Thus, extension of the deferral period does not have the effect of deferring competitive rate reductions because small operators are not required in any event to make such reductions at this time. Moreover, the waiver does not relieve small operators of their obligation to meet other conditions necessary to take advantage of the refund deferral period other than achieving compliance with rate regulations by July 14, 1994. See Section 76.922(b)(6)(B) and n.3, supra. The waiver also does not permit small operators to raise their rates above permitted March 31, 1994 levels during the extended deferral period. In addition, the waiver will not relieve small operators of refund liability incurred because their March 31, 1994 rates are unlawfully high, as measured under the Commission's initial benchmark regulations. See 47 C.F.R. 76.922(b)(4)(C).

[8] The Cable Services Bureau has received other requests for clarification of how the Commission's rate regulations apply to small operators. See, e.g., Letter from Coalition of Small System Operators to Meredith J. Jones, Chief, Cable Services Bureau regarding revenue neutral restructuring for systems with less than 1,000 subscribers (dated May 17, 1994). These issues will be addressed in the near future.

price transition relief.[9] Therefore, extending the refund deferral period to this category of operators could result in some consumers paying a higher amount for cable services than permitted under the Commission's rules during the extended deferral period. Further, small systems owned by MSOs with more than 15,000 subscribers are likely to have greater resources than are available to small operators. As such, the Commission's concern that small operators may experience significant difficulty complying with the Commission's rules in a timely manner does not apply to the same degree to systems with fewer than 1,000 subscribers that are owned by MSOs with more than 15,000 subscribers. Moreover, the Commission has already afforded small systems owned by small MSOs administrative relief to ease the burden of compliance with the revised rate regulations. Thus, the waiver of Section 76.922(b)(6)(B), as discussed above, is limited to small operators.

6. Accordingly, IT IS ORDERED that Section 76.922(b)(6)(B) is waived to extend the refund deferral liability period to September 1, 1994 for small operators, as discussed above.

7. IT IS FURTHER ORDERED, that the Emergency Petition for Limited Extension of Refund Liability Deferral Period for Small Systems and Small Operators is GRANTED in part and DENIED in part to the extent discussed above.

8. IT IS FURTHER ORDERED, that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[9] See 47 C.F.R. Section 76.922(b)(4)(B)(ii).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 94-619

In the Matter of	)
	)
Cable Operators' Rate Justification Filings	)

ORDER

Adopted: June 13, 1994 Released: June 14, 1994

By the Chief, Cable Services Bureau:

1. Several parties have requested clarification or extension of various filing deadlines for both benchmark and cost of service rate justification filings. In this Order, we clarify our deadlines and we grant in part an extension of time for submissions to correct or amend pending cost-of-service filings. We retain all other filing deadlines unchanged.

2. With regard to the requests for clarification, we note that there are currently two sets of filings, with separate deadlines for each:

Pending filings. Pending filings (both benchmark and cost of service) are those that seek to justify rates that were in place from September 1, 1993 to May 14, 1994. These pending filings, whether benchmark or cost of service, may be modified and/or corrected, according to the Bureau's May 23 Order,[1] until June 24, 1994.

New filings. Filings to support rates in effect on or after May 15, 1994 have the following deadlines:

> Benchmark filings: Must be submitted on FCC Form 1200 (and related forms) by June 15, 1994, pursuant to §76.922(b)(6)(A); this deadline can be deferred, if

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[1] Cable Operators' Rate Justification Filings, Order, DA 94-526, released May 23, 1994 (May 23 Order). The correction or amendment of pending cost-of-service filings does not require use of the forms adopted in the Cost Order; those forms are required for cost showings supporting rates in effect on or after May 15, 1994 only.

conditions are met, to August 15, 1994, pursuant to §76.922(b)(6)(B).

Cost of Service filings: Must be submitted on FCC Form 1220 or 1225 by July 14, 1994, pursuant to footnote 60 of the Cost Order;[2] this deadline can be deferred, if conditions are met, to August 15, 1994, pursuant to §76.922(b)(6)(B).[3]

These filing deadlines for justifications of rates in effect on or after May 15, 1994 are dependent on the form of rate justification the operator selects, and are not affected by the form of rate justification an operator submitted for rates prior to May 15, 1994.[4]

3. We have received requests, by letter and motion, for extensions of time on the filing deadlines noted above.[5] Some parties request that the June 24 filing date for correction or amendment of pending cost-of-service filings be extended to July 14. They assert that July 14 itself sould be a challenging deadline, and that operators should have the time until July 14

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[2] Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nol. 93-215, FCC 94-39, released March 30, 1994, 59 Fed. Reg. 17975 (Apr. 15, 1994) (Cost Order) at n.60.

[3] We believe that confusion may have arisen regarding the filing deadline for cost-of-service showings due to the wording of note 60 of the Cost Order, and the omission of this requirement from the rules as adopted. The July 14 filing date established for cost-of-service filings acknowledges the greater complexity of such filings compared to the benchmark filings, for which a June 15 date was established. As noted here, however, both cost-of-service and benchmark filings justifying rates going forward may be deferred to August 15 by an operator that satisfies the conditions spelled out in Section 76.922(b)(6)(B) of the rules. This deferral does not apply to showings already pending.

[4] That is, an operator with a pending benchmark showing that decides to file cost-of-service justification for going-forward rates has the same filing date for the cost-of-service submission as it would have had if its pending showing were also cost of service. Similarly, an operator filing a benchmark justification for going-forward rates, but having a pending cost-of-service showing for pre-rules rates, is held to the benchmark filing date.

[5] See, e.g., Letter of May 26, 1994, from Christopher W. Savage to Kathleen M. H. Wallman, Acting Chief, Cable Services Bureau; Letter of June 1, 1994, from Shirley Coleman, Prime Cable, to Mary Ellen Burns, Chief, Consumer Protection Division.

in order to assure that the resulting showings are accurate and reliable.

4. We agree with the reasoning set forth above, and we accordingly grant the requested extension of time, for correction or amendment of pending cost-of-service filings, to July 14, 1994.[6]

5. This extension does not apply to the correction or amendment of pending benchmark filings; these submissions are still due on June 24, 1994.

6. It has also been suggested, in letters and motions, that all filings, cost-of-service or benchmark, pending or new, be due on August 14.[7] Parties urging this extension state that the pending filing and the new filing, where both are cost-of-service filings, draw on the same data, use the same allocations, and perform many of the same calculations; and that the two filings can therefore be approached most efficiently, and with the greatest likelihood of accurate results, if their filing deadlines are the same. These parties assert that this unity of filing dates would be simplest and most efficient, and would best assure the reliability of the submissions made.

7. We deny this overall extension request because we find that it is unnecessary and unsupported. Because the June 24 benchmark amendment filing deadline and the newly established July 14 cost-of-service amendment filing deadline concern filings that are at the operator's option and that simply amend or correct already-submitted showings, we believe that the time periods established are reasonable, and allow operators adequate time to assure that these filings are reliable.

8. Finally, we have received a "Petition to Extend Deferral Period" from Fleischman and Walsh ("Fleischman"), a law firm representing several cable television operators. Fleischman argues that alleged inconsistencies between the Commission's written instructions for completing FCC Form 1220, the cost-of-service form to be used in showings to justify rates in effect on or after May 15, 1994, and the Commission's computer spreadsheet program for that form, create the need for an extension, until September 1, 1994, of the refund liability deferral period and of the cost-of-service filing date. Fleischman notes that the

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[6] Our action here changes the procedural dates established by the Commission, but does not, absent action by local franchising authorities, affect deadlines that they have established.

[7] See Savage Letter, supra n.5. This suggestion has also been made informally, for example in telephone contacts.

written instructions direct the operator to sum two items of interest expense, and four of revenue and income adjustments, while the spreadsheet directs the operator to sum three items of interest expense and five of revenue and income adjustments. Fleischman argues that this discrepancy produces vastly different results, and may result in operators' reevaluating their use of cost-of-service rather than benchmark rate support. Fleischman urges that more time is needed to allow operators to evaluate their rate support, provide subscribers with appropriate notice, and complete the required forms.

9. It is true that the written instructions erroneously cite lines 48-50 and 52-56 rather than lines 47-50 and 51-56 as the lines to be summed. However, the complete language of the instructions, viewed in context, makes clear that all the lines in question are to be included. The instructions for line 50 read, "Compute the total interest expenses." This follows immediately the introductory caption: "Interest Expenses (Lines 47 through 50)." In this context, it should have been evident to parties basing their rates on the cost-of-service process that an instruction to sum only line 48 and 49 was incorrect. The same is true with respect to the line 51-55 calculations regarding revenue and income adjustments.

10. Both the paper and electronic versions of the form itself also make this intention clear. In both cases, the form provides a boldface caption followed by several line items, then a boldface total line for that group. **Interest Expenses** is followed by three line items, then **TOTAL INTEREST EXPENSES**. **Revenue and Income Adjustments** is followed by five line items, then **TOTAL REVENUE AND INCOME ADJUSTMENTS**. Despite the instruction's specificity, it should have been evident upon a fair reading, ini context, that the **TOTAL** entry should include all the line items in the captioned group or at least that further inquiry was appropriate.

11. We accordingly deny Fleischman's petition for a blanket extension of the deferral period. To the extent that an operator has actually relied on the instructions, however, and has incurred expense as a direct consequence, we will entertain petitions for special relief to provide additional time to resolve the difficulties resulting from actual reliance on the incorrect instructions. An operator requesting such relief should demonstrate with specificity its reliance and the direct relationship between any expenditures incurred and the erroneous instruction.

12. Accordingly, IT IS ORDERED that the due date for filings amending or correcting pending cost-of-service showings IS EXTENDED TO JULY 14, 1994.

13. IT IS FURTHER ORDERED that the petition of Fleischman and Walsh IS DENIED.

14. IT IS FURTHER ORDERED that all other filing deadlines discussed above ARE RETAINED UNCHANGED.

FEDERAL COMMUNICATONS COMMISSION

Meredith J. Jones

Meredith J. Jones
Chief, Cable Services Bureau

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

DA 94-682

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

June 22, 1994

PRIVATE RADIO BUREAU
FREQUENCY COORDINATOR ERROR RATE STUDY
SUMMARY OF FINDINGS

The Land Mobile Branch of the Private Radio Bureau's Licensing Division recently completed an eight week review of coordinator return rates (errors) in the following areas: frequencies below 470 MHz, frequencies in the 470-512 MHz band, and frequencies in the 800/900 MHz band. The review encompassed the February 7, 1994 through March 31, 1994 period.

The attached charts indicate the error rate for each coordinator during the period, listed by frequency band. When analyzing error rates, it is important to note the actual number of applications filed.

The Commission will periodically conduct additional studies of all frequency coordinator error rates to insure that the coordinators are serving the public in a responsible manner.

The results of this survey are attached. For further information, contact W. Riley Hollingsworth, Deputy Chief, Licensing Division, Private Radio Bureau, Gettysburg, Pa. at 717-337-1311, ext. 130.

Frequency Coordinator Survey 2/7/94 to 3/31/94 Land Mobile Branch General Facilities Section
Below 470 MHz

Radio Service *	Frequency Coordinator	Error Rate	Total # of Coordinated Application Processed	Total # of Coordinated Application w/ errors in Items #1-25	B. Total # of Coordinated Applications w/ missing Items #1-25	Total # of Faulty Applications (the sum of A and B)
IV	Alliance of Motion Picture and Television Producers	25.00%	8	2	0	2
PH	American Association of State Highway and Transportation Officials	6.36%	110	5	2	7
LA	American Automobile Association, Inc.	12.50%	24	3	0	3
LI, LJ LU, LV	American Trucking Association, Inc.	1.18%	85	1	0	1
LR	Association of American Railroads	5.08%	177	8	1	9
PL, PP	Associated Public Safety Communications Officers, Inc.	2.71%	848	21	2	23
IB	Central Station Alarm Association	7.14%	14	1	0	1
IF	Forest Industrial Telecommunications	4.76%	63	3	0	3
PO	Forestry Conservation Communications Association	13.41%	82	2	9	11
IS	Industrial Telecommunications Association	2.47%	405	6	4	10
PF	International Municipal Signal Association	6.06%	330	17	3	20
PM, PS	Intl. Municipal Signal Assoc. / National Assoc. of Bus. & Educ. Radio	4.95%	222	10	1	11
LX	International Taxicab and Livery Association	12.28%	57	7	0	7
IX	Manufacturers Radio Frequency Advisory Committee	2.10%	238	4	1	5
IB	National Association of Business and Educational Radio, Inc.	6.89%	3744	178	80	258
IY	Newspaper Association of America	0%	1	0	0	0
IP	Petroleum Frequency Coordinating Committee	5.67%	141	5	3	8
IT	Telephone Maintenance Frequency Advisory Committee	3.13%	64	2	0	2
IW	Utilities Telecommunications Council	8.00%	225	16	2	18

*See Page 5

Frequency Coordinator Survey 2/7/94 to 3/31/94 Land Mobile Branch Special Facilities Section
470-512 MHz

Radio Service*	Frequency Coordinator	Error Rate	Total # of Coordinated Applications Processed	A. Total # of Coordinated Applications w/ errors in Items #1-25	B. Total # of Coordinated Applications w/ missing Items #1-25	Total # of Faulty Applications (the sum of A and B)
PL, PP	Associated Public Safety Communications Officers, Inc.	0%	13	0	0	0
IS	Industrial Telecommunications Association	16.67%	6	1	0	1
PF	International Municipal Signal Association	0%	5	0	0	0
LX	International Taxicab and Livery Association	50.00%	2	0	1	1
IB	National Association of Business and Educational Radio, Inc.	2.74%	73	2	0	2
IP	Petroleum Frequency Coordinating Committee	0%	3	0	0	0

*See Page 5

Frequency Coordinator Survey 2/7/94 to 3/31/94 Land Mobile Branch Special Facilities Section

Frequency Coordinator Survey 2/7/94 to 3/31/94 Land Mobile Branch Special Facilities Section
800/900 MHz

Radio Service*	Frequency Coordinator	Error Rate	Total # of Coordinated Applications Processed	A. Total # of Coordinated Applications w/ errors in Items #1-25	B. Total # of Coordinated Applications w/ missing Items #1-25	Total # of Faulty Applications (the sum of A and B)
GP	Associated Public Safety Communications Officers, Inc.	19.35%	31	5	1	6
YP	Associated Public Safety Communications Officers, Inc.	25.00%	24	6	0	6
GF	Associated Public Safety Communications Officers, Inc.	3.85%	26	1	0	1
YF	Associated Public Safety Communications Officers, Inc.	0%	8	0	0	0
YX	Associated Public Safety Communications Officers, Inc.	0%	3	0	0	0
GO	Industrial Telecommunications Association	4.76%	21	1	0	1
YO	Industrial Telecommunications Association	3.28%	61	1	1	2
GX	Industrial Telecommunications Association	8.57%	70	4	2	6
YX	Industrial Telecommunications Association	0%	15	0	0	0
GI	Industrial Telecommunications Association	5.88%	17	1	0	1
YI	Industrial Telecommunications Association	25.00%	4	1	0	1
GB	National Association of Business and Educational Radio, Inc.	9.73%	370	35	1	36
YB	National Association of Business and Educational Radio, Inc.	7.69%	13	1	0	1
GX	National Association of Business and Educational Radio, Inc.	5.80%	1104	55	9	64
GS	National Association of Business and Educational Radio, Inc.	3.07%	358	10	1	11
YX	National Association of Business and Educational Radio, Inc.	0%	2	0	0	0
GU	National Association of Business and Educational Radio, Inc.	23.81%	63	15	0	15
YU	National Association of Business and Educational Radio, Inc.	3.39%	59	2	0	2

*See Page 5

RADIO SERVICES

GB	800 MHz Conventional Business
GF	800 MHz Conventional Public Safety/Special Emerg. Nat'l Plan
GI	900 MHz Conventional Other Industrial/Land Transportation
GO	800 MHz Conventional Other Industrial & Land Transportation
GP	800 MHz Conventional Public Safety & Special Emergency
GS	900 MHz Private Carrier Paging
GU	900 MHz Conventional Business
GX	800 MHz Conventional SMR
IB	Business
IF	Forest Products
IP	Petroleum
IS	Special Industrial
IT	Telephone Maintenance
IV	Film and Video Production
IW	Power
IX	Manufacturers
IY	Relay Press
LA	Automobile Emergency
LI	Interurban Passenger
LJ	Interurban Property
LR	Railroad
LU	Urban Passenger
LV	Urban Property
LX	Taxicab
PF	Fire
PH	Highway Maintenance
PL	Local Government
PM	Emergency Medical
PO	Forestry Conservation
PP	Police
PS	Special Emergency
YB	800 MHz Trunked Business
YF	800 MHz Trunked Public Safety/Special Emergency Nat'l Plan
YI	900 MHz Trunked Other Industrial/Land Transportation
YO	800 MHz Trunked Other Industrial & Land Transportation
YP	800 MHz Trunked Public Safety & Special Emergency
YU	900 MHz Trunked Business
YX	800 MHz Trunked SMR

DA 94-704

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
	)
Petition for Rulemaking and	)
Petition for Relief in	)
Section 214 Video Dialtone	)
Application Process	)

ORDER

Adopted: June 24, 1994 Released: June 24, 1994

Comment Date: July 12, 1994

Reply Date: July 27, 1994

By the Chief, Policy and Program Planning Division, Common Carrier Bureau:

1. On May 23, 1994, the Center for Media Education, Consumer Federation of America, Office of Communication of the United Church of Christ, National Association for the Advancement of Colored People, and the National Council of La Raza (Petitioners) filed two petitions relating to the deployment of video dialtone facilities. We placed these petitions on public notice, with comments due June 28 and replies due July 6, 1994.

2. On June 20, 1994, Petitioners filed a Motion for an Extension of Time on the deadline for filing comments and replies. The Petitioners request that the deadline for filing comments be extended two weeks and the deadline for filing replies be extended three weeks.

3. Petitioners state that for a number of reasons the existing pleading cycle imposes particular hardships on their organizations. They state that although they are pleased that the Commission has acted quickly to obtain comment on their petitions, the short comment period does not allow adequate time for public comment. Petitioners anticipate that a large amount of data will be filed in the comments. Petitioners claim that analyzing the data, coordinating among various organizations, and drafting a useful response will require more than the currently scheduled one week reply period, which includes the Fourth of July weekend. Petitioners state that the deadlines impose particular hardship on the petitioning organizations. They claim that the organizations have very limited resources and some already are working on other pending legislative and policy matters (including the FCC's June 28 en banc hearing on children's television and EEO Inquiry for which replies are due on June 28). Petitioners also ask that the deadlines be extended so as to accommodate

on June 28). Petitioners also ask that the deadlines be extended so as to accommodate vacation schedules of key personnel during the original pleading cycle. Finally, Petitioners state that their lead counsel will be unavailable during the reply period because she is moving her residence.

4. We do not routinely grant extensions of time.[1] We believe, however, that the public interest would be served by providing Petitioners the additional time they request. We also consider the fact that Petitioners are the parties who filed the petitions on which comment is sought. Thus, we grant Petitioners' motion and extend the date for filing comments until July 12, 1994, and extend the date for filing reply comments until July 27, 1994.

5. Accordingly, IT IS ORDERED that the Petitioners' Request for Extension of Time IS GRANTED.[2]

FEDERAL COMMUNICATIONS COMMISSION

James D. Schlichting

James D. Schlichting
Chief, Policy and Program Planning Division,
Common Carrier Bureau

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[1] 47 C.F.R. § 1.46(a).

[2] This action is taken pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET, N.W.
WASHINGTON, D.C. 20554

DA 94-764

News Media Information (202) 632-5050. Recorded listing of releases and texts (202) 632-0002.

July 8, 1994

FCC ANNOUNCES PROCEDURES GOVERNING STATE PETITIONS FOR AUTHORITY TO REGULATE COMMERCIAL MOBILE RADIO SERVICE RATES

The Omnibus Budget Reconciliation Act of 1993 prohibits states from regulating the entry into business or the rates of any commercial mobile radio service (CMRS)or private mobile radio service.[1] This provision takes effect August 10, 1994. However, as discussed below, states may petition for the authority to regulate the rates of CMRS providers under certain circumstances specified by statute. States that regulated rates for CMRS as of June 1, 1993, must petition before August 10, 1994 to extend this authority. The Commission has 12 months to complete all actions on such petitions, including reconsideration. During the time the petition is pending, the state's existing regulation remains in effect. After August 10, 1994, states may also petition to initiate rate regulation of CMRS providers. The Commission must grant or deny a petition to initiate rate regulation within nine months of submission. The FCC must grant a petition to extend or initiate CMRS rate regulation if the state shows:

> (i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or
>
> (ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such

[1] Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, Title VI, § 6002(b)(2), 107 Stat. 312, 392 (1993) amending Section 332(c)(3) of the Communications Act.

State.[2]

The following is a non-exhaustive list of examples of the types of evidence, information, and analysis that may be considered pertinent to determine market conditions and the need for consumer protection:

(i) The number of commercial mobile radio service providers in the state, the types of services offered by commercial mobile radio service providers in the state, and the period of time that these providers have offered service in the state.

(ii) The number of customers of each commercial mobile radio service provider in the state; trends in each provider's customer base during the most recent annual period or other data covering another reasonable period if annual data is unavailable; and annual revenues and rates of return for each commercial mobile radio service provider.

(iii) Rate information for each commercial mobile radio service provider, including trends in each provider's rates during the most recent annual period or other data covering another reasonable period if annual data is unavailable.

(iv) An assessment of the extent to which services offered by the commercial mobile radio service providers the state proposes to regulate are substitutable for services offered by other carriers in the state.

(v) Opportunities for new providers to enter into the provision of competing services, and an analysis of any barriers to such entry.

(vi) Specific allegations of fact (supported by affidavit of person with personal knowledge) regarding anti-competitive or discriminatory practices or behavior by commercial mobile radio service providers in the state.

(vii) Evidence, information, and analysis

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[2] 47 U.S.C. § 332 (c)(3)(A). With respect to the requirement in (ii) that "such service is a replacement for land line telephone exchange service", a state's petition must demonstrate that a substantial portion of the commercial radio service subscribers in the state or a specified geographic area have no alternative means of obtaining basic telephone service. This showing may include evidence of the range of basic telephone service alternatives available to consumers in the state.

demonstrating with particularity instances of systematic unjust and unreasonable rates, or rates that are unjust or unreasonably discriminatory, imposed upon commercial mobile radio service subscribers. Such evidence should include an examination of the relationship between rates and costs. Additionally, evidence of a pattern of such rates that demonstrates the inability of the commercial mobile radio service marketplace in the state to produce reasonable rates through competitive forces will be considered especially probative.

(viii) Information regarding customer satisfaction or dissatisfaction with services offered by commercial mobile radio service providers, including statistics and other information about complaints filed with the state regulatory commission.[3]

Petitions must include a certification that the state agency filing the petition is the duly authorized state agency responsible for the regulation of telecommunication services in the state, and must identify and describe in detail the rules the state proposes to establish if the petition is granted. States bear the burden of proof. An original and four copies of the petition should be filed with the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554.

Comments may be filed within 30 days after public notice of the filing of a petition. Public notice of state petitions will be given in the Federal Register. Replies are due 15 days after the expiration of the filing period for comments. Except for Section 1.45, the practice and procedure rules contained in 47 C.F.R. §§ 1.42-1.52 apply to these petitions. These proceedings will be treated as non-restricted under the *ex parte* rules, so that *ex parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules.[4]

By the action of the Deputy Chief, Land Mobile and Microwave Division, Private Radio Bureau. For further

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[3] 47 C.F.R. §20.13(a)(2).

[4] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206.

information contact Gina Harrison, Private Radio Bureau, (202) 632-7125.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

July 21, 1994

DA 94-807

Request for Waiver to Use Frequencies in the 500-506 MHz Band in New York City

A Request for Waiver of Parts 2 and 90 of the Commission's Rules and Regulations to permit use of frequencies in the 500-506 MHz Band (television Channel 19) was submitted by the New York City Transit Police Department (NYCTPD) on April 8, 1994. NYCTPD is designing a new UHF communications system and is requesting fifteen channels, which will be configured in a trunked system for voice and data. NYCTPD states that unique circumstances, including the lack of available spectrum in New York City for emergency communications and the inability to provide adequate interoperability between public safety agencies, justify a waiver.[1]

While the 500-506 MHz band is the subject of a pending low power television (LPTV) request in New York City, studies by the Commission indicate that this band is not suitable for full power television or for advanced television (ATV) use in New York City because the band is used by land mobile radio services in Philadelphia. Further, our preliminary analysis indicates that grant of thus request would not affect the ATV Table of Allotments currently under development by the Commission. We request comment on this preliminary conclusion, as well as on the following questions:

1) Does the pending LPTV request for use of the 500-506 MHz band, or other potential uses for this band, mitigate against grant of the waiver?

2) If granted, what limitations should be placed on the waiver to protect other potentially affected users?

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[1] We note that the 482-488 MHz band (television channel 16) also is the subject of a pending waiver request by several public safety agencies in the New York metropolitan area.

Parties desiring to file comments on the above issues, or any other matters pertinent to the request for waiver, must reference **DA 94-807** on the cover page of their comments. Comments must be submitted by August 22, 1994. Reply comments must be submitted by September 6, 1994. Comments and reply comments should be submitted to the Secretary, Federal Communications Commission, 1919 M St. NW, Washington, D.C. 20554.

The Request for Waiver is available for inspection in the FCC Dockets Reference Center (Room 239), 1919 M Street N.W., Washington, D.C. 20554. The Request also may be purchased from the Commission's duplication contractor, International Transcription Service, Inc., 2100 M Street, NW, Suite 140, Washington DC 20036, (202) 857-3800. For further information, contact Ray LaForge, (202) 653-8117; internet: RLAFORGE@FCC.GOV.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-823

July 26, 1994

STATUS INQUIRIES UNDER THE COMMISSION'S
EX PARTE RULES

This public notice reminds the public that the exemption to the Commission's ex parte rules for status inquiries is limited to "an inquiry or request for information relating to the status of a proceeding." The exemption for status inquiries includes important explicit limitations:

> A status inquiry which states or implies a preference for a particular party or position in a proceeding, or which states why timing is important to a particular party, or which in any other manner is intended as a means, direct or indirect, to address the merits or outcome, or influence the timing, of a proceeding is a presentation.
>
> NOTE: Any congressional or other communication expressing concern with administrative delay in a particular proceeding or expressing concern that a particular proceeding be resolved expeditously, will be treated as a status inquiry and therefore excluded from the definition of presentation, Provided That no view is expressed as to the merits or outcome of the proceeding; no view is expressed as to a date by which the proceeding should be resolved; and no specific reasons are given as to why the proceeding should be resolved expeditiously, other than the need to resolve administrative delay.

47 C.F.R. §1.1202(a) & Note.

By the General Counsel.

For further information, contact Steve Bailey (202) 418-1720.

-FCC-

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-902

AUGUST 19, 1994

PRIVATE RADIO BUREAU EXTENDS TIME TO CONSTRUCT NON-NATIONWIDE 220 MHz STATIONS THROUGH APRIL 4, 1995 AND LIFTS FREEZE FOR APPLICATIONS TO MODIFY SITE LOCATIONS

On March 30, 1994, the Private Radio Bureau released an Order extending the time to construct non-nationwide 220 MHz stations to December 2, 1994.[1] On August 4, 1994, the American Mobile Telecommunications Association (AMTA), on behalf of three manufacturers of 220 MHz equipment: SEA, Inc., Uniden America Corporation and E.F. Johnson Company,[2] requested that the Bureau further extend this period. In support of this request, petitioners contend that licensees will have difficulty meeting the December 2, 1994, deadline because 220 MHz equipment is not readily available. Petitioners also contend that the Commission's action incorporating a Petition for Declaratory Ruling filed by SunCom Mobile & Data, Inc. (SunCom) into the Further Notice of Proposed Rule Making in GN Docket No. 93-252,[3] created an inference that a further extension would be provided.

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[1] This extension of time to construct non-nationwide 220 MHz stations and place them in operation was granted to allow licensees approximately eight months (consistent with 47 C.F.R. § 90.725(f)) to construct their stations after termination of Evans v. Federal Communications Commission. Order, Per Curiam, Evans v. Federal Communications Commission, Case No. 92-1317 (D.C. Cir. March 18, 1994). The Order granting this extension applied to stations authorized on or before March 30, 1994.

[2] AMTA indicated that E.F. Johnson agreed in principle with its position but may not agree with all dates and deadlines advocated by AMTA (letter from Alan Shark to Ralph A. Haller, Chief, Private Radio Bureau, dated August 4, 1994). E.F. Johnson later confirmed that it supports an extension of time but does not otherwise concur with all aspects of AMTA's request (letter from Russell H. Fox to Ralph A. Haller, Chief, Private Radio Bureau, dated August 5, 1994).

[3] See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Further Notice of Proposed Rule Making, 9 FCC Rcd 2863 (1994), at para. 38 and note 61.

We do not fully attribute licensees' inability to construct their non-nationwide 220 MHz stations to equipment unavailability or to our consideration of SunCom's petition. Licensees have been on notice of the December 2, 1994, construction deadline since the release of the Order on March 30, 1994. This new deadline restored the full 8-month construction period afforded to licensees of non-nationwide 220 MHz stations under our Rules. See 47 C.F.R. § 90.725(f). With respect to SunCom's petition, we note that the mere filing of a petition and the Commission's consideration of that petition creates no expectation that the petition will be granted. Therefore, licensees should not have presumed that construction requirements had or would have been suspended or would no longer be applied.

We do, however, recognize the extenuating circumstances surrounding the implementation of 220 MHz service. In view of this, we do believe that a short additional extension is appropriate, but not to the extent or for the reasons proffered in the above-referenced correspondence. We note that the Commission recently adopted a Third Report and Order in GN Docket No. 93-252 addressing the regulatory framework for the commercial mobile radio services (CMRS).[4] A uniform 12-month construction requirement for CMRS licensees was adopted. By imposing a deadline of December 2, 1994,[5] we gave non-nationwide 220 MHz licensees approximately eight months from March 30, 1994, to construct. Because it appears that many of these systems may meet the definition of CMRS, we will use the decisions in the Third Report and Order in GN Docket No. 93-252 as a guide in determining the length of extension that we deem appropriate. Accordingly, we will grant a four-month extension until April 4, 1995, to construct non-nationwide 220 MHz systems with original license grant dates on or before March 30, 1994, and place them in operation. We are also granting a four-month extension to construct non-nationwide 220 MHz station with original license grant dates after March 30, 1994. Thus, a licensee of a non-nationwide 220 MHz station with an original grant date after March 30, 1994, now has one year from that grant date to construct the station and place it in operation.

In response to numerous requests and inquiries regarding the need and desire of existing 220 MHz licensees to construct and operate at sites other than those for which they were originally authorized, we are hereby modifying the current freeze on the filing of 220 MHz applications.[6] Accordingly, 30 days after

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[4] See Report No. DC-2638.

[5] Order, PR Docket No. 89-552, 9 FCC Rcd 1739 (1994).

[6] See Order, In the Matter of Acceptance of 220-222 MHz Private Land Mobile Applications, 6 FCC Rcd 3333 (1991).

publication of this Public Notice in the Federal Register, the current freeze on the filing of 220 MHz applications will be lifted only with respect to those licensees applying to modify a station license to relocate the station to an alternative site in the same geographic area. A licensee must obtain an STA to operate at its newly-requested site if the licensee has not obtained a grant of its modification application at the time it intends to place the station in operation.

Furthermore, a licensee that constructs its station and places it in operation on or before April 4, 1995, will be considered to have met its construction requirement if the licensee constructs its station and places it in operation (1) at the site specified by the original license; or (2) at the site requested by the STA, if the application to modify its license to this site is ultimately granted. Thus, a licensee that takes the risk of not constructing at its originally-authorized site, and instead constructs its station and places it in operation at a site authorized only by STA, will not be considered to have met its April 4, 1995, construction requirement if its modification application cannot be granted (e.g., because of co-channel separation requirements). In that event, the license cancels automatically because the station will not have been constructed at an authorized site.

We are still processing the applications that were filed in May, 1991. When we have completed the processing of these applications, we will begin processing license modification applications filed pursuant to this Public Notice. Applications to modify licenses to specify a different site in the same geographic area will be granted only if they meet the applicable assignment criteria with respect to all previously-granted licenses.

Applications filed pursuant to this Public Notice to modify the locations of existing stations will be granted on a first-come, first-served basis. Applications filed on the same day will be considered filed simultaneously. In the event that we receive modification requests on the same day that are mutually exclusive, we will establish procedures to resolve them at that time.

For further information contact the Consumer Assistance Branch at (717) 337-1212, or John J. Borkowski, Rules Branch at (202) 632-7125.

- FCC -

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/418-0500 Recorded listing of releases and texts 202/632-0002

DA 94-904

August 19, 1994

COMMISSION SEEKS COMMENT ON REQUEST FOR DECLARATORY RULING AND INTERLOCUTORY ORDER ON NUMBERING PLAN AREA CODE RELIEF PLAN
IAD File No. 94-102

Comments Due:	September 16, 1994
Reply Comments Due:	September 30, 1994

On August 4, 1994, MobileMedia Communications, Inc.; Page Mart, Inc.; and Paging Network, Inc., filed a Request for Declaratory Ruling and Interlocutory Order on the Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois ("Ameritech"). The petitioners request the Commission to issue a declaratory ruling, pursuant to Section 1.2 of the Commission's rules, that the take-back of telephone numbers assigned to the petitioners on behalf of their customers and the simultaneous implementation of the proposed new 630 Numbering Plan Area (NPA) code by Ameritech constitute unjust and unreasonable practices in violation of Section 201(b) of the Communications Act and are unreasonably discriminatory in violation of Section 202(a) of the Act. The petitioners also seek an immediate interlocutory order to preserve the status quo ante in the assignments of central office (NXX) codes in the 708, 312, and 630 NPA codes because the petitioners claim that they and the public they serve would otherwise suffer irreparable harm.

Because of an impending depletion of NXX codes in the 708 NPA code, Ameritech, as Central Office Code Administrator for Illinois, has proposed a relief plan for the 708 NPA and the introduction of a new NPA (630) that would overlay the geographic area of the 708 and 312 NPAs in the Chicago area. Ameritech's 708 NPA relief plan includes: (1) assigning NXX codes in the 312 NPA to wireless carriers until the new 630 NPA becomes available while continuing to assign new NXX codes in the 708 NPA to wireline carriers; and (2) requiring wireless carriers to give back all the NXX codes they have in the 708 NPA at a specified time after the 630 NPA becomes available.

Ameritech's 630 NPA overlay plan has some similarities with the 917 NPA overlay of the 212 and 718 NPAs that was implemented by NYNEX in New York City. Ameritech's plan also has some similarities with the initial implementation proposals by Pacific Bell for a new NPA (562) to overlay the 310 NPA in the Los Angeles area. Any Commission decision on the petitioners' requests could also impact these and any other future NPA overlay implementation proposals.

We invite comment on the petitioners' Request for Declaratory Ruling and Interlocutory Order, and on how the Commission should handle the petitioners' requests. Initial comments should be filed on or before September 16, 1994, and reply comments should be filed on or before September 30, 1994. All comments should be filed with the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comment captions should include the Industry Analysis Division (IAD) file number shown above. The full text of the request from MobileMedia Communications, Page Mart, and Paging Network, as well as other documents filed with the Commission on telephone numbering issues, are available for inspection and duplication between the hours of 9:00 a.m. and 4:00 p.m. in the Public Reference Room of the Common Carrier Bureau's Industry Analysis Division, located at 1250 23rd Street, N.W., Plaza Level, Washington, D.C. Copies may also be obtained from International Transcription Service by calling (202) 857-3800.

For further information, contact Mary Green, Industry Analysis Division, (202) 418-0940.

- FCC -

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

DA 94-980

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

September 8, 1994

Finder's Preference Program - Revised Checklist with Current Fee Information

The Federal Communications Commission (Commission) revised the procedures for handling finder's preference requests in the Memorandum Opinion and Order, PR Docket 90-481 released September 13, 1993. **The revised rules became effective as of November 1, 1993.** This checklist is a guide to assist applicants in filing finder's preference requests. If you desire to file a finder's preference request you should obtain copies of:

1. Report and Order, PR Dkt 90-481, 6 FCC Rcd 7297(1991);
2. Memorandum Opinion and Order, PR Dkt 90-481, 8 FCC Rcd 6690 (Released September 13,1993); and
3. Current list of Pending Finder's Requests (to check if the targeted station has been awarded to another finder, or is the subject of another finder's request).

Copies of these documents may be obtained by calling the Commission's Copy Contractor, ITS, at 717-337-1433.

This checklist is merely a summary; the Commission's Report and Order and the Memorandum Opinion and Order govern the program. This checklist supersedes the checklist released April 10, 1992, Public Notice, 7 FCC Rcd 2578(1992) and the revised checklist released October 27, 1993, Public Notice, 8 FCC Rcd 8133(1993).

The Finder's Preference Program provides incentives to eligible persons who submit conclusive evidence to the Commission that results in the recovery of unconstructed or non-operational private land mobile channels licensed on an exclusive basis in the 220-222 MHz, 470-512 MHz, and 800/900 MHz bands (including 900 MHz phase I SMRS). Persons assisting the Commission in recovering these channels in these bands, and who satisfy the specified procedural requirements are entitled to a "preference" for channels ultimately recovered.

Finders must submit information to establish a prima facie against the target licensee. The Commission will dismiss the request if the finder does not meet its burden of proof. Finder's requests must also meet specific procedural requirements. The Commission will return a request that contains a procedural error but will process such a request in its original place in line if the finder corrects and resubmits the request within 60 days of the date of the return notice. The Commission cautions, however, that finders are permitted one opportunity only to correct procedural errors; if a resubmitted request contains any procedural errors the Commission will dismiss it and the finder will forfeit its place in line and any filing fee. To avoid the return and/or dismissal of a finder's request, the request must:

1. State that the finder is seeking a finder's preference.
2. Provide the name, mailing address, and call sign of the target licensee (even if the finder believes the target is out of business).
3. List the licensed location and frequencies involved; do not just refer, for example, to "the 800 MHz band."

4. List the Commission rule(s) that you allege the target licensee is violating; include the benchmark dates the target licensee missed. Requests are not accepted which allege failure to construct or place in operation until 180 days after the applicable construction/placed in operation deadline.

5. Provide your statement--who, what, why, where, and when--about the violations you allege. Have witnesses provide separate statements. The finder has the burden of proving that the violations alleged have occurred; avoid general or conclusory statements. Failure to present a prima facie case will result in the dismissal of the finder's preference request.

6. Submit all statements under oath or under penalty of perjury pursuant to Section 1.16 of the Commission's rules. 47 CFR § 1.16. Example: "I declare under penalty of perjury that the statements made in this finder's preference request are true and correct." No notarization is required; however, simply "subscribing" before a notary does not meet this requirement.

7. Send an original and three copies to the proper Commission address (service on the target licensee is no longer the responsibility of the finder):

a) If you are not fee exempt, send the request with a Form 159 and the correct fee (currently $125 per channel) to: Federal Communications Commission, Fee Correspondence, PO Box 358305, Pittsburgh, PA 15251-5305. The fee code is PDX.

b) Other correspondence including fee exempt requests and non-feeable correspondence should be addressed to: Federal Communications Commission, Finder's Preference Program, 1270 Fairfield Road, Gettysburg, PA 17325-7245.

8. Do not file an application (Form 574) for the targeted channels until you receive a finder's preference award letter from the Commission. You will have 90 days from the date of your award letter to file an acceptable application. (Consensual finder's may file applications as noted below.)

9. Each finder's request must stand on its own and must not cross-reference to other filings.

10. Consensual preference requests (A "consensual" finder's request is where a finder gets an existing licensee to cancel its license voluntarily because the existing licensee will be unable to construct and operate by its deadline.) -- file well before the existing licensee's construction and operation (8th month or 1 year) deadline. File the existing licensee's cancellation request with the finder's award request. The finder will assume the existing licensee's construction and operation deadline if the Commission grants an award letter and the finder's timely application.

Consensual finders may file their application (Form 574) when filing their award request. File your application separately following regular application requirements; reference that you filed a consensual finder's request for the channel(s) you seek.

Both the existing licensee and the finder must certify that they have not and will not give or receive any direct or indirect compensation in connection with the consensual license cancellation. Consensual finder's may expedite their requests in order to meet the applicable construction deadline by calling the Licensing Division at 717-337-1212 or 800-322-1117 to request expedited treatment.

If a finder's request states a prima facie case and meets all procedural requirements, the Commission will forward it to the target licensee and provide such licensee an opportunity to respond (generally 30 days).

For further information call the Licensing Division at 717-337-1212/800-322-1117.

--FCC--

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET, N.W.
WASHINGTON, D.C. 20554

DA 94-1043

News Media Information (202) 632-5050. Recorded listing of releases and texts (202) 632-0002.

September 22, 1994

FCC ANNOUNCES ESTABLISHMENT OF DOCKETS FOR MATERIALS FILED IN CONNECTION WITH STATE PETITIONS FOR AUTHORITY TO REGULATE COMMERCIAL MOBILE RADIO SERVICE RATES

Pursuant to the Omnibus Budget Reconciliation Act of 1993,[1] eight states filed petitions for the authority to continue regulating the intrastate rates of mobile radio service providers. Because of the high volume of responsive comments, dockets have been established for pleadings regarding the state petitions. All future pleadings, including replies, regarding these state petitions, should reference the docket number assigned to the state petition in issue and should be filed with the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554.

The petitions, together with their corresponding new docket numbers (and, for reference, the former file numbers), are as follows:

1. Petition of Public Utilities Commission, State of Hawaii, for Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, formerly PR File No. 94-SP1, **now PR Docket No. 94-103.**

2. Petition to Extend State Authority over Rate and Entry Regulation of All Commercial Mobile Radio Services, filed by the Arizona Corporation Commission, formerly PR File No. 94-SP2, **now PR Docket No. 94-104.**

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[1] Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, Title VI, § 6002(b)(2), 107 Stat. 312, 392 (1993) amending Section 332(c)(3) of the Communications Act.

3. Petition of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service Rates (accompanied by Request for Proprietary Treatment of Documents Used in Support of Petition to Retain Regulatory Authority over Intrastate Cellular Service Rates), formerly PR File No. 94-SP3, **now PR Docket No. 94-105.**

4. Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut (filed Autust 9, 1994), formerly PR File No. 94-SP4, **now PR Docket No. 94-106.**

5. Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana, formerly PR File No. 94-SP5, **now PR Docket No. 94-107.**

6. Petition to Extend Rate Regulation Filed by the New York State Public Service Commission, formerly PR File No. 94-SP6, **now PR Docket No. 94-108.**

7. Statement of the Public Utilities Commission of Ohio's Intention to Preserve its Right for Future Rate and Market Entry Regulation of Commercial Mobile Radio Services, formerly PR File No. 94-SP7, **now PR Docket No. 94-109.**

8. State Petition for Authority to Maintain Current Regulation of Rates and Market Entry (Sect.20.12), filed by the Public Service Commission of Wyoming, formerly PR File No. 94-SP8, **now PR Docket No. 94-110.**

By the action of the Acting Chief, Land Mobile and Microwave Division, Private Radio Bureau. For further information contact Gina Harrison or Julia Kogan, Private Radio Bureau, (202) 632-7125.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-1068

September 29, 1994

PETITIONS FOR RECONSIDERATION OF ORDER ON RECONSIDERATION (PP DOCKET 93-253)

Petitions for reconsideration have been filed in response to the Commission's Order On Reconsideration, PP Docket No. 93-253, FCC 94-217, (adopted August 15, 1994). The petitions seek reconsideration of the Commission's decisions to: (1) grant an exemption to Indian tribes or Alaska Native Corporations from the affiliation rules for broadband PCS entrepreneurs' blocks eligibility; and (2) permit passive investors in a corporate broadband PCS applicant to own up to 15 percent of the corporation's voting stock, provided the other conditions of licensing are met.

These petitions are placed on Public Notice pursuant to 47 C.F.R §1.429(e). The full texts of these petitions are available for viewing and copying in Room 239, 1919 M Street, NW, Washington, DC or may be purchased from the Commission's duplicating contractor, ITS, Inc., (202) 857-3800. Oppositions to these petitions must be filed within 10 days of the date of publication of the petitions in the Federal Register. See Section 1.4(b)(1) of the Commission's rules (47 C.F.R §1.4(b)(1)). Replies to oppositions must be filed within 5 days after the time for filing oppositions has expired.

SUBJECT: Implementation of Section 309(j) of the Communications Act-- Competitive Bidding. (PP Docket 93-253)

PETITIONS FOR RECONSIDERATION FILED BY:

William J. Franklin, Attorney for the Association of Independent Designated Entities on 09-21-94.

Debra L. Lee, Executive Vice President and General Counsel, Maurita K. Coley, Senior Vice President - Legal Affairs for Black Entertainment Television on 09-21-94.

For further information contact Lisa Warner at (202) 634-2443.

--FCC--

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET, N.W.
WASHINGTON, D.C. 20554

DA 94-1083

News Media Information (202) 632-5050. Recorded listing of releases and texts (202) 632-0002.

September 30,1994

COMMENT SOUGHT ON DRAFT PROTECTIVE ORDER
(PR DOCKET NO. 94-105)

At an **ex parte** meeting held on September 30, 1994, in the proceeding on the Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority over Intrastate Cellular Service, referenced above, to which all parties of record were invited, representatives of the Private Radio Bureau requested that all interested parties submit their comments on the attached Draft Protective Order on or before Friday, October 7, 1994. This Draft Protective Order addresses confidentiality issues raised by the Request for Proprietary Treatment of Documents Used in Support of Petition to Retain Regulatory Authority Over Intrastate Cellular Service Rates filed by the State of California and the Public Utilities Commission of the State of California on August 8, 1994.

By the action of the Chief, Land Mobile and Microwave Division, Private Radio Bureau. For further information contact Gina Harrison, Private Radio Bureau, (202) 632-7125.

DRAFT

PROTECTIVE ORDER

Adopted: ; Released:

By the Chief, Private Radio Bureau:

It is HEREBY ORDERED:

1. For purposes of this Order, "Confidential Information" shall mean and include trade secrets and commercial or financial information which is privileged or confidential under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552 (b)(4), as well as material claimed to be gathered in an ongoing antitrust investigation of the cellular industry by the Attorney General of the State of California (Investigation).

2. Confidential Information submitted herein by the People of the State of California and the Public Utilities Commission of the State of California (California) shall be segregated from all material filed and deemed non-confidential as generally set forth in the pleadings filed publicly by California on August 9, 1994, and subsequent revisions filed on Septebmer 13, 1994, in PR Docket No. 94-105. Confidential information, as redacted, shall consist of:

a. Market share data as contained in pages 29 to 34 of the unredacted Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain State Regulatory Authority Over Intrastate Cellular Service Rates (Petition) and Appendix E thereto. The data on page 29 is disggregated by carrier, and on pages 30-35, aggregated by market. Some data on page 30 is further aggregated by combining data in two markets. The data in Appendix E is aggregated as to resellers by market, and disggregated for cellular carriers.

b. Capacity utilization figures as contained in pages 50-53 of the Petition, and in Appendix M. This data is aggregated for the Los Angeles market on page 51 and Appendix M-1, and disaggregated as to specific carriers on pages 52-53 of the Petition and Pages M-1 to M-3 of Appendix M.

c. Financial data per subscriber unit, including revenues, operating expenses, plant, operating income, subscriber growth percentages for 1989-93, found in Appendix H to the Petition. This data is disaggregated as to specific cellular carriers.

d. Number of customers per year, per rate plan, both wholesale and retail as contained in Appendix J to the Petition. This data is disaggregated as to specific cellular carriers.

e. Material redacted from pages 42, 45 and 75 of the Petition which California claims to have been gathered in the Investigation.

3. Confidential Information may be disclosed:

a. to counsel for the Parties listed hereinafter in Appendix A (Parties) and their associated attorneys, paralegals and clerical staff predicated on a "need to know" basis.

b. to specified persons, including employees of the Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in connection with PR Docket No. 94-105.

4. Counsel may request the Commission to provide one copy of Confidential Information (for which counsel must, as a prerequisite, acknowledge receipt pursuant to this Order), and counsel may thereafter make no more than two additional copies but only to the extent required and solely for the preparation and use in this proceeding, and provided further, that all such copies shall remain in the care and control of counsel at all times. Following the filing of Further Comments on ____, 1994, counsel shall retain custody of the Confidential Information until such time as it is necessary to prepare additional filings in connection with PR Docket No. 94-105 in the discretion of counsel. If such additional filings are necessary, counsel shall retain custody of the Confidential Information following submission of such additional filings. Counsel shall return to the Commission within forty-eight hours after the final resolution of PR Docket No. 94-105 all Confidential Information originally provided by the Commission as well as all copies made, and shall certify that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel may retain copies of pleadings submitted on behalf of clients.

5. Confidential Information shall not be used by any person granted access under this Order for any purpose, other than for use in this proceeding, and shall not be used for competitive business purposes or otherwise disclosed by such persons to any other person except in accordance with this Order. This shall not preclude the use of any material or information in the public domain or which has been developed independently by any other person.

6. a. Counsel inspecting or copying Confidential Information shall apply for access to the materials covered by this Order under and by use of the "Attorney Application For Access To Materials Under Protective Order" appended to this Order.

b. Counsel may disclose Confidential Information to persons to whom disclosure is permitted under the terms of this Order only after advising such persons of the terms and obligations of this Order.

c. Counsel shall provide to the FCC and, in the absence of a need for confidentiality, to California, the name and affiliation of each person other than counsel to whom

disclosure is made or to whom actual physical control over the documents is provided. To the extent that anyone's name is not disclosed to California, that fact shall be disclosed to the FCC and California.

7. Parties may in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. any portions of the pleadings that contain or disclose Confidential Information are physically segregated from the remainder of the pleading:

b. the portions containing or disclosing Confidential Information are covered by a separate letter referencing this Protective Order:

c. each page of any Party's filing that contains or discloses Confidential Information subject to this Order is clearly marked "confidential information included pursuant to Protective Order, DA 94-___."

d. the confidential portion of the pleading shall be served upon the Secretary of the Commission, California and the other Parties and not placed in the Commission's Public File, unless the Commission directs otherwise. The Parties may provide courtesy copies to the Legal Advisor to the Private Radio Bureau Chief, who will distribute the copies to the appropriate Commission personnel.

8. Disclosure of materials described herein shall not be deemed a waiver by California or any other Party in any other proceeding, judicial or otherwise, of any privilege or entitlement to confidential treatment of such Confidential Information. Inspecting parties, by viewing said documents: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceedings; and (c) agree that accidental disclosure of privileged information shall not be deemed a waiver of the privilege.

9. The entry of this Order is without prejudice to the rights of California to apply for additional or different protection where it is deemed necessary or to the rights of the Parties to request further or renewed disclosure of Confidential Information. Moreover, it in no way binds the Commission from disclosing any information where the public interest so requires.

10. This Order is issued under Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller, Chief
Private Radio Bureau

APPENDIX A

PARTIES

AirTouch Communications

American Mobile Telecommunications Association, Inc.

Bakersfield Cellular Telephone Co.

Bay Area Cellular Telephone Company

California Public Utilities Commission, People of the State of California

Cellular Agents Trade Association

Cellular Carriers Association of California

Cellular Resellers Association, Inc.

Cellular Telecommunications Industry Association

County of Los Angeles

E. F. Johnson Co.

GTE Service Corporation

Los Angeles Cellular Telephone Company

McCaw Cellular Communications, Inc.

Mobile Telecommunications Technologies Corp.

National Cellular Resellers Association

Nextel Communications, Inc.

Paging Network, Inc.

Personal Communications Industry Association

Utility Consumers' Action Network & Towards Utility Rate Normalization

US West Cellular of California

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002. DA 94-1256

November 14, 1994

PRIVATE RADIO BUREAU SEEKS FURTHER COMMENT ON ONECOMM CORPORATION'S REQUEST FOR COMMISSION CONSENT TO TRANSFER CONTROL TO NEXTEL COMMUNICATIONS, INC.

On August 12, 1994, OneComm Corporation, N.A. ("OneComm") submitted an FCC Form 703 application seeking the Commission's consent to transfer control of OneComm to Nextel Communications, Inc. ("Nextel") pursuant to Section 90.153 of the Commission's rules, 47 C.F.R. § 90.153. OneComm also seeks consent to transfer control of a OneComm affiliate, C-Call Corp., to Nextel. On October 3, 1994, the Private Radio Bureau solicited comments on all aspects of OneComm's applications. Comments were due on of before October 18, 1994, and reply comments were due on or before October 25, 1994.

On November 3, 1994, OneComm amended its application to include additional licenses and applications omitted in the above-referenced August 12, 1994 application for transfer of control to Nextel. In addition, on November 3, 1994, Motorola Inc. ("Motorola") requested that the record in this matter be reopened to include a proposed Final Judgment between Motorola, Nextel and the Department of Justice, filed with the United States District Court for the District of Columbia on October 27, 1994.

In consideration of these new filings, we request additional comments in this proceeding, specifically addressing both OneComm's amended applications and the relevance, if any, of the proposed Final Judgment to the OneComm/Nextel transaction. All comments should be filed on or before November 21, 1994. There will be no reply period. Comments and reply comments should be addressed to: Rules Branch, Land Mobile and Microwave Division, Private Radio Bureau, Room 5202, STOP 1700A1, Federal Communications Commission, Washington, D.C. 20554. Copies of the above-referenced filings may be obtained from the Commission's copy contractor, ITS, Inc., 2100 M Street, N.W., Suite 140, (202) 857-3800. Copies are also available for public inspection in Room 5202, 2025 M Street, N.W., Washington, D.C. 20554.

For further information contact the Rules Branch at (202) 634-2443.

--FCC--

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1283

In the matter of	)	
	)	
Buckeye Cablevision, Inc.	)	CUID No. OH0539
Oregon, Ohio	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 17, 1994 Released: November 18, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider a complaint about the price Buckeye Cablevision, Inc. ("Cablevision") was charging for its cable programming service ("CPS") tier in Oregon, Ohio, CUID No. OH0539. Cablevision has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order will address the reasonableness of Cablevision's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cablevision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cablevision implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

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[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

Procedural Matters

4. The first complete and timely CPS complaint was served on Cablevision on February 22, 1994.[11] The Commission received the complaint on February 25, 1994.

5. Cablevision attempted to justify its CPS price through an FCC Form 393 filed on March 15, 1994 in response to the complaint. Cablevision amended its justification twice: on June 22, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12] then on November 4, 1994 in response to a Commission letter citing still unresolved deficiencies in Cablevision's amended showing.[13]

Discussion

6. Cablevision asserts that its monthly CPS tier price of $10.76 per subscriber is justified by its benchmark filing because its price equals the maximum permitted charge calculated in the filing. Upon review of Cablevision's FCC Form 393, as amended, we have found the following errors that require a recalculation of Cablevision's maximum permitted CPS price:

a. In calculating its capital costs of service, installation and maintenance of equipment, and its leased customer equipment capital costs, Cablevision did not use the 11.25% rate of return prescribed by the Commission (Form 393, Part III, Schedules A and C, Column F).[14] By not using the 11.25% rate of return prescribed, an operator could effectively increase its CPS price. Furthermore, this approach leaves a portion of an operator's equipment costs bundled with its programming charge. Accordingly,

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[11] The complaint was dated February 19, 1994 and states that it was mailed to Cablevision on February 22, 1994. Cablevision has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider February 22, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] Letter from John M. Spencer to Bradley Mefferd, Treasurer, Buckeye Cablevision, Inc. (October 31, 1994).

[14] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ 295 n.715 (1993) (*"Rate Order"*). *See also Questions and Answers on Cable Television Rate Regulation*, Question and Answer No. 15 (released May 6, 1994)("Therefore, in completing Forms 1205 and 393, operators must include an 11.25% return on equipment and installation charges before unbundling equipment and installation charges.").

in completing Schedules A and C, Cablevision should have used an 11.25% rate of return.

b. Cablevision's November 4, 1994 amendment corrects the amount of utility expenses (applicable to service installation and maintenance of equipment) reflected in Form 393, Part III, Schedule B. We incorporate this amendment to Schedule B (and subsequent steps) accordingly.

While these errors should not have been made, correction of these errors does not have the net effect of requiring Cablevision to reduce its maximum permitted monthly CPS tier price of $10.76.

Conclusions

7. Upon review of the record herein, we conclude that Buckeye Cablevision, Inc.'s showing supports a maximum reasonable CPS tier price of $10.76 per month (plus franchise fees) for the period February 25, 1994 to May 14, 1994.[15]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the February 19, 1994 complaint against the cable programming service price charged by Buckeye Cablevision, Inc. in Oregon, Ohio, CUID No. OH0539, IS DENIED TO THE EXTENT INDICATED HEREIN.

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[15] This finding is based solely on the representations of Cablevision listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Buckeye Cablevision, Inc. with respect to Oregon, Ohio, CUID No. OH0539, for the period of February 25, 1994 to May 14, 1994, justifies a maximum price of $10.76 per month (plus franchise fees) for Buckeye Cablevision, Inc.'s cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1284

In the matter of	)	
	)	
Buckeye Cablevision, Inc.	)	CUID No. OH0417
Rossford, Ohio	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 17, 1994 Released: November 18, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider a complaint about the price Buckeye Cablevision, Inc. ("Cablevision") was charging for its cable programming service ("CPS") tier in Rossford, Ohio, CUID No. OH0417. Cablevision has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order will address the reasonableness of Cablevision's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cablevision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cablevision implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

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[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

Procedural Matters

4. The first complete and timely CPS complaint was served on Cablevision on October 15, 1993.[11] The Commission received the complaint on October 26, 1993.

5. Cablevision attempted to justify its CPS price through an FCC Form 393 filed on November 17, 1993 in response to the complaint. Cablevision amended its justification twice: on June 22, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12] then on November 4, 1994 in response to a Commission letter citing still unresolved deficiencies in Cablevision's amended showing.[13]

Discussion

6. Cablevision asserts that its monthly CPS tier price of $10.76 per subscriber is justified by its benchmark filing because its price equals the maximum permitted charge calculated in the filing. Upon review of Cablevision's FCC Form 393, as amended, we have found the following errors that require a recalculation of Cablevision's maximum permitted CPS price:

a. In calculating its capital costs of service, installation and maintenance of equipment, and its leased customer equipment capital costs, Cablevision did not use the 11.25% rate of return prescribed by the Commission (Form 393, Part III, Schedules A and C, Column F).[14] By not using the 11.25% rate of return prescribed, an operator could effectively increase its CPS price. Furthermore, this approach leaves a portion

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[11] The complaint was dated October 6, 1993. Although the complainant certified that a copy of the complaint was served on Cablevision, the date of service was not provided on the complaint form. Cablevision has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider the service date to be October 15, 1993, the postmark date on the envelope containing the copy of the complaint that was filed with the Commission.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] Letter from John M. Spencer to Bradley Mefferd, Treasurer, Buckeye Cablevision, Inc. (October 31, 1994).

[14] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ 295 n.715 (1993) (*"Rate Order"*). *See also Questions and Answers on Cable Television Rate Regulation*, Question and Answer No. 15 (released May 6, 1994)("Therefore, in completing Forms 1205 and 393, operators must include an 11.25% return on equipment and installation charges before unbundling equipment and installation charges.").

of an operator's equipment costs bundled with its programming charge. Accordingly, in completing Schedules A and C, Cablevision should have used an 11.25% rate of return.

b. Cablevision's November 4, 1994 amendment corrects the amount of utility expenses (applicable to service installation and maintenance of equipment) reflected in Form 393, Part III, Schedule B. We incorporate this amendment to Schedule B (and subsequent steps) accordingly.

While these errors should not have been made, correction of these errors does not have the net effect of requiring Cablevision to reduce its maximum permitted monthly CPS tier price of $10.76.

Conclusions

7. Upon review of the record herein, we conclude that Buckeye Cablevision, Inc.'s showing supports a maximum reasonable CPS tier price of $10.76 per month (plus franchise fees) for the period October 26, 1993 to May 14, 1994.[15]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 6, 1993 complaint against the cable programming service price charged by Buckeye Cablevision, Inc. in Rossford, Ohio, CUID No. OH0417, IS DENIED TO THE EXTENT INDICATED HEREIN.

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[15] This finding is based solely on the representations of Cablevision listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Buckeye Cablevision, Inc. with respect to Rossford, Ohio, CUID No. OH0417, for the period of October 26, 1993 to May 14, 1994, justifies a maximum price of $10.76 per month (plus franchise fees) for Buckeye Cablevision, Inc.'s cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1285

In the matter of	)	
	)	
Warner Cable Communications	)	CUID No. WI0438
Milwaukee, Wisconsin	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Prices	)	

Memorandum Opinion and Order

Adopted: November 17, 1994 Released: November 18, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider complaints about the price Warner Cable Communications ("Warner") was charging for its cable programming service ("CPS") tier in Milwaukee, Wisconsin, CUID No. WI0438. Warner has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Warner's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Warner has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Warner implemented its CPS price under the new regulations. See para. 3, *infra*.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994, forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994, through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994, through a benchmark showing, operators must use the FCC Form 1200 series.[10]

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[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

Procedural Matters

4. The first valid CPS complaint was completed and served on Warner on November 18, 1993.[11] The Commission received the complaint on November 23, 1993. (Warner disputes the validity of several subsequent complaints filed by other cable subscribers. Because we have accepted this complaint as properly filed, we find it unnecessary to rule on Warner's objections to these later filed complaints.)

5. Warner attempted to justify its CPS price through an FCC Form 393 filed on December 17, 1993. In response to additional complaints, filings were made on March 23, 1994, and on June 14, 1994. All of these justifications were substantially identical. Warner amended its justification twice: on June 24, 1994, in response to an Order citing common deficiencies observed in benchmark filings generally,[12] then on August 26, 1994, in response to a Commission letter citing still unresolved deficiencies in Warner's amended showing.[13]

6. A February 1, 1994 restructuring of Warner's channel lineup prompted additional parties to file a second series of complaints. Two channels, Channel WJJA-49 and Channel WHKE-55, were added to the basic tier and carried on channels 49 and 51, respectively. The QVC Fashion Channel, which had previously been carried on the CPS tier on channel 49, was dropped entirely. The Nostalgia Channel, which had been carried on the CPS tier on channel 51, was moved to channel 64 which it shares with the Travel Channel, on a part-time basis. Warner thus increased the rate charged for its service by reducing the number of channels available on the CPS tier without a consequent reduction in price. Warner failed to notify the Commission of the rate change as required in the instructions to Form 393. [14]

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[11] The complaint was dated November 18, 1993, and states that it was mailed to Warner on that date. Warner has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider November 18, 1993 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] Letter from John M. Spencer to John F. Herbert, Jr., Vice President, Finance and Controller, Milwaukee Division, Warner Cable Communications (August 9, 1994).

[14] General Instruction 1 (on page 2) to FCC Form 393, clearly requires that while there is a complaint regarding CPS rates pending before the Commission, the cable operator must inform the Commission of any CPS rate increase and submit a revised Form 393.

7. On May 17, 1994, the City of Milwaukee adopted a rate order setting prices for basic tier service and associated equipment and installations in response to Warner's Form 393 rate petition. Warner has agreed not to appeal the adopted order.[15]

Discussion.

8. Warner claims that its monthly CPS tier price of $9.74 per subscriber is justified by its benchmark filing, which shows a maximum permitted charge of $9.74. However, upon review we have determined that Warner has not correctly calculated its maximum permitted price, and it is appropriate to make the following adjustments to Warner's calculations in Form 393[16]:

> In its most recent Form 393 filing, Warner calculated the Inflation Adjustment Factor (Line 127, Worksheet 1, Part II) as of the end of October 1993. However, the figures Warner used are not consistent with data on which it should have relied in calculating the Inflation Adjustment Factor. Warner used the Gross National Product Price Index ("GNP-PI") data released by the U.S. Department of Commerce on August 31, 1993 to complete Lines 122 and 125, but used an outdated GNP-PI of 121.8 for the third quarter of 1992 in calculating Line 123. The GNP-PI figure for the third quarter of 1992 released on August 31, 1993 was 122.5. Warner's calculation of the Inflation Adjustment Factor is thus incorrect.
>
> We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Warner filed. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including GNP-PI figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Warner used in justifying its rates.

This adjustment has the effect of changing the maximum permitted monthly price from November 23, 1993 to January 31, 1994 for the CPS tier from $9.74 to $9.62.

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[15] Letter, from Tom Sharrard, President, Milwaukee Division, Warner Cable Communications to Ron Kuisis, Cable Franchise Officer, City of Milwaukee (May 10, 1994). This letter was included as an attachment to the City's rate order.

[16] With respect to the regulatory status of Warner's *a la carte* package, this issue is addressed in the Commission's Letter of Inquiry Order. *See Warner Cable Communications*, Milwaukee, Wisconsin LOI-93-14, DA 94-1276, released November 18, 1994.

9. On February 1, 1994, Warner changed its channel line-up. As described in para. 6 above, two channels were added to the basic tier, one service was dropped from the CPS tier, and another CPS service was moved off of one channel onto another channel already shared by a third CPS service on a part-time basis. Warner failed to submit a Form 393 or any other justification covering the restructuring and concomitant rate increase for the CPS tier which took place on February 1, 1994. To determine Warner's subsequent permitted per channel charge as of that date, and thus, Warner's maximum permitted price, we relied on the Commission's Rules then in effect[17] and therefore made the following adjustment to Form 393:[18]

> On Part I, the number of channels on the CPS tier was changed from 25 to 27 and the number of channels on the CPS tier was changed from 22 to 20.

This adjustment has the effect of changing the maximum permitted monthly price for the CPS tier after the restructuring to $8.74.

Conclusions.

10. Upon review of the record herein, we conclude that Warner's showing supports a maximum reasonable CPS tier price of $9.62 per month (plus franchise fee) for the period November 23, 1993 to January 31, 1994; and $8.74 per month (plus franchise fee) for the period February 1, 1994 to May 14, 1994.[19] We further determine that we will order appropriate refunds pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the November 18, 1993 complaint against the cable programming service price charged by Warner in Milwaukee, Wisconsin, CUID No.

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[17] 47 C.F.R. § 76.922(c) (1993) (amended, effective May 15, 1994).

[18] 47 C.F.R. § 76.922(a) provides that the maximum monthly charge per subscriber for a tier shall consist of a permitted per channel charge multiplied by the number of channels on the tier, plus a charge for franchise fee. The figure $8.74 is derived by multiplying the per channel we calculated, $.437, by 20.

[19] These findings are based solely on the representations of Warner listed in paragraph 5, *supra*, and the modifications described in paragraphs 8 and 9, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

WI0438, and all other complaints related to the prices considered herein, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

12. IT IS FURTHER ORDERED, that the benchmark filing submitted by Warner Cable Communications with respect to the City of Milwaukee, Wisconsin, CUID No. WI0438, for the period of November 23, 1993 to January 31, 1994, justifies a maximum price of $9.62 per month (plus franchise fees) for Warner Cable Communications' cable programming service tier.

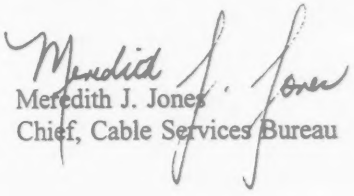
13. IT IS FURTHER ORDERED, that the benchmark calculation for Warner Cable Communications with respect to the City of Milwaukee, Wisconsin, CUID No. WI0438, for the period of February 1, 1994 to May 14, 1994, justifies a maximum price of $8.74 per month (plus franchise fee) for Warner Cable Communications' cable programming service tier.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Warner Cable Communications shall refund to subscribers that portion of the amounts paid for CPS service from November 23, 1993[20] to January 31, 1994, that exceeded $9.62 per month (plus franchise fee), and was thus unreasonable, plus interest to the date of the refund.

15. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Warner Cable Communications shall refund to subscribers that portion of the amounts paid for CPS service from February 1, 1994 to May 14, 1994, that exceeded $8.74 per month (plus franchise fee), and was thus unreasonable, plus interest to the date of the refund.

16. IT IS FURTHER ORDERED, that Warner Cable Communications shall promptly determine the overcharges to CPS subscribers for the stated periods, and shall within 21 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION



Meredith J. Jones
Chief, Cable Services Bureau

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[20] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1286

In the matter of	)	
	)	
United Cable Television of	)	CUID No. CA1194
East San Fernando Valley, Ltd.	)	
Los Angeles, California	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 17, 1994 Released: November 18, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider complaints about the price United Cable Television of East San Fernando Valley, Ltd. ("United Cable") was charging for its cable programming service ("CPS") tier in Los Angeles, California, CUID No. CA1194. United Cable has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of United Cable's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent United Cable has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which United Cable implemented its CPS price under the new regulations. See para. 3, *infra*.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

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[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

Procedural Matters

4. The first valid CPS complaint was completed and served on United Cable on December 3, 1993.[11] The Commission received the complaint on December 9, 1993.

5. United Cable attempted to justify its CPS price through an FCC Form 393 filed on April 6, 1994. United Cable amended its justification twice: on May 31, 1994 in order to correct errors found in the initial filing, and on September 14, 1994 in response to a Commission letter citing still unresolved deficiencies in United Cable's amended showing.[12]

Discussion

6. In its amended benchmark filing of September 14, 1994, United Cable calculated a maximum permitted price for the CPS tier of $10.07 per month. However, United Cable's actual price for the CPS tier was $11.19 per month. Thus, United Cable has failed to demonstrate that its price for the CPS tier was not unreasonable.

7. We will therefore set a price for this tier. In doing so we must recalculate the Inflation Adjustment Factor in Form 393, Part II, Worksheet 1, on the basis of the most accurate data currently available for the date as of which United Cable filed.[13] On its amended Form 393, United Cable calculated the Inflation Adjustment Factor as of the end of October 1993 using data released on August 31, 1993. On July 29, 1994, the U.S. Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date United Cable used in justifying its rates. (We have not found any other apparent errors in United Cable's calculation of its maximum permitted CPS price.)

8. This adjustment has the effect of reducing the maximum permitted monthly CPS tier price from $10.07 (as United Cable calculated) to $9.97.

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[11] The complaint was dated December 3, 1993 and states that it was mailed to United Cable on that date. United Cable has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider December 3, 1993 as the service date.

[12] Letter from John M. Spencer to Kurt Taylor, United Cable (August 22, 1994).

[13] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

Conclusions

9. Upon review of the record herein, we conclude that United Cable's showing supports a maximum reasonable CPS tier price of $9.97 per month (plus franchise fee) for the period December 9, 1993 to May 14, 1994.[14] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the December 3, 1993 complaint against the cable programming service price charged by United Cable Television of East San Fernando Valley, Ltd. in Los Angeles, California, CUID No. CA1194, and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, that the benchmark filing submitted by United Cable Television of East San Fernando Valley, Ltd. with respect to Los Angeles, California, CUID No. CA1194, for the period of December 9, 1993 to May 14, 1994, justifies a maximum price of $9.97 per month (plus franchise fee) for the cable programming service tier.

12. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that United Cable Television of East San Fernando Valley, Ltd. shall refund to subscribers that portion of the amounts paid for cable programming service from December 9, 1993[15] to May 14, 1994, that exceeded $9.97 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

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[14] This finding is based solely on the representations of United Cable listed in paragraph 5, *supra*, and the modifications described in paragraph 7, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[15] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

13. IT IS FURTHER ORDERED, that United Cable Television of East San Fernando Valley, Ltd. shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 21 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of the Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1287

In the matter of	)	
	)	
Buckeye Cablevision, Inc.	)	CUID No. OH0019
Toledo, Ohio	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 17, 1994 Released: November 18, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider a complaint about the price Buckeye Cablevision, Inc. ("Cablevision") was charging for its cable programming service ("CPS") tier in Toledo, Ohio, CUID No. OH0019. Cablevision has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order will address the reasonableness of Cablevision's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Cablevision has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Cablevision implemented its CPS price under the new regulations. See para. 3, *infra*.

[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

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[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

Procedural Matters

4. The first complete and timely CPS complaint was served on Cablevision on February 28, 1994.[11] The Commission received the complaint on February 28, 1994.

5. Cablevision attempted to justify its CPS price through an FCC Form 393 filed on March 15, 1994 in response to the complaint. Cablevision amended its justification twice: on June 22, 1994 in response to a Cable Services Bureau Order citing common deficiencies observed in benchmark filings generally,[12] then on November 4, 1994 in response to a Commission letter citing still unresolved deficiencies in Cablevision's amended showing.[13]

Discussion

6. Cablevision asserts that its monthly CPS tier price of $10.76 per subscriber is justified by its benchmark filing because its price equals the maximum permitted charge calculated in the filing. Upon review of Cablevision's FCC Form 393, as amended, we have found the following errors that require a recalculation of Cablevision's maximum permitted CPS price:

a. In calculating its capital costs of service, installation and maintenance of equipment, and its leased customer equipment capital costs, Cablevision did not use the 11.25% rate of return prescribed by the Commission (Form 393, Part III, Schedules A and C, Column F).[14] By not using the 11.25% rate of return prescribed, an operator could effectively increase its CPS price. Furthermore, this approach leaves a portion of an operator's equipment costs bundled with its programming charge. Accordingly,

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[11] The complaint was dated February 28, 1994 and states that it was mailed to Cablevision on that date. Cablevision has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider February 28, 1994 as the service date.

[12] *Cable Operators' Rate Justification Filings*, DA 94-526 (released May 23, 1994).

[13] Letter from John M. Spencer to Bradley Mefferd, Treasurer, Buckeye Cablevision, Inc. (October 31, 1994).

[14] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 at ¶ 295 n.715 (1993) (*"Rate Order"*). *See also Questions and Answers on Cable Television Rate Regulation*, Question and Answer No. 15 (released May 6, 1994)("Therefore, in completing Forms 1205 and 393, operators must include an 11.25% return on equipment and installation charges before unbundling equipment and installation charges.").

in completing Schedules A and C, Cablevision should have used an 11.25% rate of return.

b. Cablevision's November 4, 1994 amendment corrects the amount of utility expenses (applicable to service installation and maintenance of equipment) reflected in Form 393, Part III, Schedule B. We incorporate this amendment to Schedule B (and subsequent steps) accordingly.

While these errors should not have been made, correction of these errors does not have the net effect of requiring Cablevision to reduce its maximum permitted monthly CPS tier price of $10.76.

Conclusions

7. Upon review of the record herein, we conclude that Buckeye Cablevision, Inc.'s showing supports a maximum reasonable CPS tier price of $10.76 per month (plus franchise fees) for the period February 28, 1994 to May 14, 1994.[15]

8. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the February 28, 1994 complaint against the cable programming service price charged by Buckeye Cablevision, Inc. in Toledo, Ohio, CUID No. OH0019, IS DENIED TO THE EXTENT INDICATED HEREIN.

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[15] This finding is based solely on the representations of Cablevision listed in paragraph 5, *supra*, and the modifications described in paragraph 6, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

9. IT IS FURTHER ORDERED, that the benchmark filing submitted by Buckeye Cablevision, Inc. with respect to Toledo, Ohio, CUID No. OH0019, for the period of February 28, 1994 to May 14, 1994, justifies a maximum price of $10.76 per month (plus franchise fees) for Buckeye Cablevision, Inc.'s cable programming service tier.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1334

In the matter of	)	
	)	
Times Mirror Cable Television of	)	CUID No. CA0193
Orange County, Inc. (d/b/a Dimension	)	
Cable Services)	)	
San Clemente, California	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 28, 1994 Released: November 29, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider complaints about the price Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) ("Dimension") was charging for its cable programming service ("CPS") tier in San Clemente, California, CUID No. CA0193. Dimension has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Dimension's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Dimension has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Dimension implemented its CPS price under the new regulations. See para. 3, *infra*.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

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[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

Procedural Matters

4. The first valid CPS complaint was completed and served on Dimension on September 20, 1993.[11] The Commission received the complaint on September 24, 1993.

5. Dimension filed its first FCC Form 393 for San Clemente, California, CUID No. CA0193, on March 29, 1994.[12] This filing was dated March 16, 1994 and signed on March 18, 1994. The Commission then received two 393 filings on May 31, 1994. One filing was dated November 9, 1993 and signed on May 26, 1994. The other filing was dated November 22, 1993 and signed on May 26, 1994. The Commission received a fourth 393 filing on June 1, 1994. This filing was dated November 9, 1993 and signed on May 26, 1994. Additionally, in response to two Commission letters citing still unresolved deficiencies in Dimension's showings,[13] Dimension amended its justification on August 25, 1994 and again on September 6, 1994. Dimension clarified by telephone that its August 25, 1994 and September 6, 1994 responses to Commission letters apply to all 21 CUID areas listed in "Exhibit A" to its 393 filing, including San Clemente.[14]

6. On June 1, 1994, Dimension filed a Motion to Dismiss the complaint dated September 20, 1993. In its motion, Dimension requests that the Commission dismiss the complaint for a number of reasons. First, Dimension asserts that the complainant incorrectly answered question number 9 on FCC Form 329 as it then existed, both because he failed to identify the programming service for which the complaint was filed and because he listed in his complaint channels that were sold on the basic service tier and on a per channel basis as well as channels that were offered on the CPS tier. In addition, Dimension urges the Commission to find the complaint deficient on the ground that the complainant failed to indicate his concurrence with the assertion in question number 13 that the rate for cable

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[11] The complaint was dated September 20, 1993, and states that it was mailed to Dimension on that date. Dimension has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider September 20, 1993 as the service date.

[12] Dimension's FCC Form 393 filings include several other franchise areas that are served by the same system in addition to San Clemente. Dimension filed substantially identical justifications for all of these franchise areas as to which the Commission received complaints.

[13] Letters from John M. Spencer to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (Aug. 10, 1994 and Aug. 31, 1994).

[14] This representation was memorialized in a letter from Leora Hochstein to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (September 14, 1994), which was served on the relevant complainants and franchising authorities.

programming service was unreasonable. Dimension's assertions do not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the complainant's response to question number 9 includes channels contained on the CPS tier and because the rates listed in answer number 8 and on the attached bill indicate that the complainant received the CPS tier, we find it reasonable to conclude that the complainant objected to the CPS tier rate and that he believed that rate was unreasonable.[15] We therefore find the complaint dated September 20, 1993 valid and deny Dimension's Motion to Dismiss. (Dimension also disputes the validity of subsequent complaints filed by other cable subscribers. Because we have accepted this complaint as properly filed, we find it unnecessary to rule on Dimension's objections to these later filed complaints.)

Discussion

7. Dimension asserts that its monthly CPS tier price of $8.10 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $8.16 as calculated in its most recent amended filing, dated September 6, 1994. Upon review, however, we have determined that Dimension has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Dimension's calculations in Form 393:

a. Dimension's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) reflect 25 satellite channels. Our examination of the channel line-up that Dimension provided in its August 25, 1994 filing, however, reveals only 23 satellite channels. Dimension apparently either incorrectly double-counted channels that were divided between two satellite services, or else counted channels that did not carry rate-regulated satellite programming during the majority of programming hours.

A "channel" is defined in the instructions to Form 393 as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. A channel that carries more than one programming service may nonetheless be counted as only one channel. Furthermore, under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or non rate-regulated and as either satellite or non-satellite. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was

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[15] We note that in January 1994 the Commission released a revised Form 329 that omitted questions 9 and 13.

analyzed based on whole, not fractional, channel counts. The preponderance-of-use test is the only one consistent with this conceptual framework.[16]

Dimension's channel line-up for September 30, 1992, lists 20 channels that were each used for one rate-regulated satellite service the entire programming day. An additional three channels were divided between two rate-regulated satellite services: channel 43 was evenly split daily between Bravo and Mind Extension University, channel 44 was evenly split daily between CNBC and the Travel Channel, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. These channels should have been counted as only one satellite channel each, for a total of 23. In addition, Dimension lists three channels that split programming between satellite and non-satellite services: channel 3 carried 15 hours of non-satellite programming titled "Local" and 9 hours of C-Span II, channel 30 carried 17 hours of local Government Access programming and 7 hours of California Channel programming (listed as satellite), and channel 40 was evenly split between KTBN (listed as non-satellite) and VISN (listed as satellite). Because none of these channels carried satellite programming during the majority of programming hours, none should have been counted as a satellite channel. We therefore adjust the number of rate-regulated satellite channels reflected in Worksheet 2 from 25 to 23, reducing the benchmark channel rate entered on Line 220 of Worksheet 2.

b. Similarly, in its calculations in Form 393, Part II, Worksheet 1, Dimension incorrectly counted 24 satellite channels as of the initial date of regulation, even though its channel line-up for September 1, 1993 shows only 20 rate-regulated satellite channels. As in Worksheet 2, Dimension may incorrectly have double-counted either or both of two channels that were divided between two satellite services: channel 43 was split daily with 10 hours of Bravo and 14 hours of Mind Extension University, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. In addition, three channels may have been counted as satellite even though they did not carry preponderantly rate-regulated satellite-delivered programming: channels 3 and 30 were split in the same manner as in 1992, and channel 54 was evenly split between rate-regulated satellite programming (VISN) and pay-per-view programming that is not subject to rate regulation. We therefore adjust the number of rate-regulated satellite channels on the initial date of regulation from 24 to 20, thereby reducing the benchmark channel rate entered on Line 121 of Worksheet 1.

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[16] *See Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

c. Dimension also incorrectly counted its rate-regulated channels as of the initial date of regulation on Form 393, Part I, and on Part II, Worksheet 1 by including channel 54 as half of a rate-regulated channel. Channel 54 carried 12 hours per day of rate-regulated satellite programming (VISN), but also carried 12 hours of pay-per-view programming that is not subject to rate regulation. As discussed above, channels must be categorized as either rate-regulated or non rate-regulated according to their preponderance of use.[17] We therefore reduce the number of channels on the CPS tier as of the initial date of regulation from 15.5 to 15.

d. At the request of a number of Orange County franchising authorities, including the City of San Clemente, Public Knowledge, Inc., a consulting firm retained by these franchising authorities, prepared a report entitled "Review of Dimension Cable Services FCC Form 393 Cable Television Rate Filings Submitted to Several Orange County Franchising Authorities", dated August 29, 1994 ("Public Knowledge Report").[18] This report was incorporated by reference in the City of San Clemente's order reviewing Dimension's basic service rates[19] and was attached to the appeal of that order that Dimension filed with the Commission on October 7, 1994. Based on the report, it is evident that Dimension included $33,703 of franchise fees as part of its equipment revenue in its September 6, 1994 amended Form 393, Part II, Worksheet 2, Line 204. Including franchise fees in Line 204 has the effect of increasing the operator's base rate per channel as of September 30, 1992, which may result in a higher maximum permitted rate. The Commission's rules contemplate recovery of franchise fees as an external cost in addition to the maximum permitted rates calculated on Form 393.[20] If franchise fees are both included in the base from which maximum permitted rates are calculated and permitted as an addition to maximum permitted rates, the operator will be able to recover these costs twice. For this reason, the instructions to Form 393, Worksheet II, Line 204, do not include franchise fees among the items that may be included as equipment revenue.[21]

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[17] *Id.*

[18] The franchising authorities who received a copy of the Public Knowledge Report are: City of Dana Point; City of Laguna Hills; City of Laguna Niguel; City of Lake Forest; City of Mission Viejo; City of San Juan Capistrano; City of San Clemente; City of Laguna Beach; and Orange County.

[19] City of San Clemente Resolution No. 94-44 (Sept. 7, 1994).

[20] 47 C.F.R. § 76.923(k).

[21] Form 393 instructions for Part II, Worksheet 2, Line 204 read as follows: "[t]o calculate your monthly average equipment revenue as of September 20, 1992, take the total revenues you earned over the preceding fiscal year for the community unit for the following

Accordingly, we remove the $33,703 of franchise fees on equipment revenues from Line 204.[22]

e. In its amended Form 393 filing, Dimension calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of October 1993 using data released by the U.S. Department of Commerce on August 31, 1993. However, Dimension failed to calculate the Inflation Adjustment Factor to at least three decimal places, as required in the instructions to Form 393.[23] Furthermore, Dimension's use of October 1993 as the date through which it calculated the inflation adjustment is impermissible. Dimension was required to file a justification of its CPS price for the San Clemente franchise area no later than October 20, 1993.[24] If Dimension had filed its justification in a timely fashion, the instructions to Form 393 would have required it to calculate the inflation adjustment only through September 1993.[25] Dimension cannot be permitted to claim an additional inflation adjustment simply because it filed Form 393 late. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date on which Dimension should have filed.[26] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate

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categories of equipment and installation services: (1) converter box rental; (2) remote control rental; (3) additional outlet fees; (4) installation fees; (5) disconnect fees; (6) reconnect fees; and (7) tier changing fees."

[22] It appears that Dimension has not included franchise fees in its equipment revenue in Part II, Worksheet 1, Line 104 of its September 6, 1994 filing. Therefore, we make no adjustments to the figure in Line 104.

[23] FCC Form 393, page 10, para. 3.

[24] 47 C.F.R. § 76.956(a) (operator must file a response within 30 days of the date of service of a complaint).

[25] FCC Form 393, page 11, instructions for line 124 (Inflation Adjustment Factor is calculated using "the number of whole months from September 30, 1992 to the date you will submit this form").

[26] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

1.028 as the Inflation Adjustment Factor through September 1993.[27]

8. Because of these errors, we conclude that Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $8.16 (as Dimension calculated in its September 6, 1994 filing) to $7.73.

9. The Public Knowledge Report also reveals that effective September 1, 1993, Dimension assessed on CPS subscribers a charge of $2.64 per month for each additional outlet. Dimension told Public Knowledge, Inc. that this charge was assessed to recover additional programming costs imposed by program suppliers to transmit CPS programming to additional outlets.[28] Under our rules, additional programming costs associated with additional outlets may be recovered as a separate monthly unbundled charge for those outlets.[29] However, Dimension failed to disclose and justify its charge as part of its rate justification before the Commission, as required by the instructions to Form 393.[30] Dimension's additional outlet charge falls within the jurisdiction of the Commission because it is imposed only on CPS subscribers and it allegedly relates solely and directly to the cost of programming that is transmitted on the CPS tier.[31] Because Dimension has failed to justify this charge, we will order it to refund the full amount of the charge collected from

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[27] Our recalculation of the Inflation Adjustment Factor in this case differs from our recalculation in the other franchise areas included in the same Form 393 filing due to a difference in the date on which the first valid complaint was served on Dimension. *Cf. Times Mirror Cable Television of Orange County, Inc., San Juan Capistrano, California*, CUID No. CA0367, DA 94-1340 (released Nov. 29, 1994).

[28] Letter from Leo W. Brennan, Vice President and General Manager, Dimension Cable Services to Jay Smith, Public Knowledge, Inc. (Aug. 19, 1994). This letter is attached to the Public Knowledge Report as Exhibit 4.

[29] 47 C.F.R. § 76.923(h).

[30] FCC Form 393, page 29, note 1.

[31] *See* 47 U.S.C. § 543(a)(2)(B). The Public Knowledge Report recommends that local franchising authorities assert jurisdiction over this charge because it is assessed on a per-outlet basis. Public Knowledge Report at 7-8. We agree with Dimension's position, as stated in its appeal of the City of San Clemente's rate order, that this charge falls within the Commission's jurisdiction. We further note the inconsistency between Dimension's position in the appeal that the Commission has jurisdiction over the additional outlet charge and its failure to attempt to justify or even to disclose that charge before the Commission.

subscribers during the period covered by this Order.[32]

Conclusions

10. Upon review of the record herein, we conclude that Dimension's showing supports a maximum reasonable CPS tier price of $7.73 per month (plus franchise fee) for the period September 24, 1993 to May 14, 1994, and that Dimension has failed to justify its additional outlet charge of $2.64 per month.[33] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the Motion of Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) to dismiss the September 20, 1993 complaint against its cable programming service price charged in San Clemente, California, CUID No. CA0193, IS DENIED.

12. IT IS FURTHER ORDERED, that the September 20, 1993 complaint against the cable programming service price charged by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) in San Clemente, California, CUID No. CA0193, and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of September 24, 1993 to May 14, 1994, justifies a maximum price of $7.73 per month (plus franchise fee) for Times Mirror Cable Television of Orange County, Inc.'s cable programming service tier.

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[32] We note that Public Knowledge, Inc. similarly concluded that Dimension had failed to show that this charge represents incremental costs actually incurred by Dimension for transmitting programming to additional outlets, despite Public Knowledge Inc.'s specific request for information on this issue. Public Knowledge Report at 7.

[33] These findings are based solely on the representations of Dimension listed in paragraph 5, *supra*, and the modifications described in paragraphs 7 and 9, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

14. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of September 24, 1993 to May 14, 1994, does not justify any separate charge for additional outlets that receive programming on the cable programming services tier.

15. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers that portion of the amounts paid for cable programming service from September 24, 1993[34] to May 14, 1994, that exceeded $7.73 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

16. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers the additional outlet charge of $2.64 per outlet per month paid by subscribers from September 24, 1993 to May 14, 1994, plus interest to the date of refund.

17. IT IS FURTHER ORDERED, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 21 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[34] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1335

In the matter of	)	
	)	
Times Mirror Cable Television of	)	CUID Nos. CA1084, CA1310, CA0675,
Orange County, Inc. (d/b/a Dimension	)	CA0723, CA1243, CA0719,
Cable Services)	)	CA0194, CA0765, CA1205
Orange County, California	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 28, 1994 Released: November 29, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider complaints about the price Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) ("Dimension") was charging for its cable programming service ("CPS") tier in Orange County, California, CUID Nos. 1084 *et al.*[1] Dimension has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Dimension's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness

[1] According to Dimension, CUID numbers CA1084, CA1310, CA0675, CA0723, CA1243, CA0719, CA0194, CA0765 and CA1205 together constitute a single franchise area. Facsimile from Mark Stucky, Dimension Cable Services, to Leora Hochstein (Sept. 7, 1994). Thus, the Commission's receipt of a valid complaint from a subscriber living in any one of these CUID areas gives the Commission jurisdiction over Dimension's price for the CPS tier throughout the franchise area. *See* 47 C.F.R. § 984(a) (prices must be uniform throughout a franchise area).

of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC

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[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Dimension has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Dimension implemented its CPS price under the new regulations. See para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.

Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

Procedural Matters

4. The first valid CPS complaint was completed and served on Dimension on February 7, 1994.[12] The Commission received the complaint on February 14, 1994.

5. Dimension filed its first FCC Form 393 filing for Orange County, California, CUID Nos. CA1084 *et al.*, on March 14, 1994.[13] This filing was dated February 25, 1994 and signed on March 9, 1994. Additionally, in response to two Commission letters citing still unresolved deficiencies in Dimension's showings,[14] Dimension amended its justification on August 25, 1994 and again on September 6, 1994. Dimension clarified by telephone that its August 25, 1994 and September 6, 1994 responses to Commission letters apply to all 21 CUID areas listed in Exhibit A" to its 393 filing including Orange County.[15]

6. On March 14, 1994, Dimension filed a Motion to Dismiss the complaint dated February 7, 1994. In its motion, Dimension requests that the Commission dismiss the complaint on the ground that the complaint is about specific requirements of the Cable Act such as equipment charges and inclusion of "must carry" stations on the basic service tier. We note that attached to the FCC Form 329 filed by the complainant are comments pursuant to question number 10 that raise issues in addition to the CPS tier rate. However, we are not

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[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[12] The complaint was dated February 7, 1994, and states that it was mailed to Dimension on that date. Dimension has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider February 7, 1994 as the service date.

[13] Dimension's FCC Form 393 filings include several other franchise areas that are served by the same system in addition to Orange County. Dimension filed substantially identical justifications for all of these franchise areas as to which the Commission received complaints.

[14] Letters from John M. Spencer to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (Aug. 10, 1994 and Aug. 31, 1994).

[15] This representation was memorialized in a letter from Leora Hochstein to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (September 14, 1994), which was served on the relevant complainants and franchising authorities.

persuaded that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the rates listed in answer number 7 and on the attached bill indicate that the complainant received the CPS tier, we find it reasonable to conclude that the complainant objected to the CPS tier rate. We therefore find the complaint dated February 7, 1994 valid and deny Dimension's Motion to Dismiss.

Discussion

7. Dimension asserts that its monthly CPS tier price of $8.10 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $8.16 as calculated in its most recent amended filing, dated September 6, 1994. Upon review, however, we have determined that Dimension has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Dimension's calculations in Form 393:

a. Dimension's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) reflect 25 satellite channels. Our examination of the channel line-up that Dimension provided in its August 25, 1994 filing, however, reveals only 23 satellite channels. Dimension apparently either incorrectly double-counted channels that were divided between two satellite services, or else counted channels that did not carry rate-regulated satellite programming during the majority of programming hours.

A "channel" is defined in the instructions to Form 393 as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. A channel that carries more than one programming service may nonetheless be counted as only one channel. Furthermore, under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or non rate-regulated and as either satellite or non-satellite. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. The preponderance-of-use test is the only one consistent with this conceptual framework.[16]

Dimension's channel line-up for September 30, 1992, lists 20 channels that were each used for one rate-regulated satellite service the entire

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[16] *See Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

programming day. An additional three channels were divided between two rate-regulated satellite services: channel 43 was evenly split daily between Bravo and Mind Extension University, channel 44 was evenly split daily between CNBC and the Travel Channel, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. These channels should have been counted as only one satellite channel each, for a total of 23. In addition, Dimension lists three channels that split programming between satellite and non-satellite services: channel 3 carried 15 hours of non-satellite programming titled "Local" and 9 hours of C-Span II, channel 30 carried 17 hours of local Government Access programming and 7 hours of California Channel programming (listed as satellite), and channel 40 was evenly split between KTBN (listed as non-satellite) and VISN (listed as satellite). Because none of these channels carried satellite programming during the majority of programming hours, none should have been counted as a satellite channel. We therefore adjust the number of rate-regulated satellite channels reflected in Worksheet 2 from 25 to 23, reducing the benchmark channel rate entered on Line 220 of Worksheet 2.

b. Similarly, in its calculations in Form 393, Part II, Worksheet 1, Dimension incorrectly counted 24 satellite channels as of the initial date of regulation, even though its channel line-up for September 1, 1993 shows only 20 rate-regulated satellite channels. As in Worksheet 2, Dimension may incorrectly have double-counted either or both of two channels that were divided between two satellite services: channel 43 was split daily with 10 hours of Bravo and 14 hours of Mind Extension University, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. In addition, three channels may have been counted as satellite even though they did not carry preponderantly rate-regulated satellite-delivered programming: channels 3 and 30 were split in the same manner as in 1992, and channel 54 was evenly split between rate regulated satellite programming (VISN) and pay-per-view programming that is not subject to rate regulation. We therefore adjust the number of rate-regulated satellite channels on the initial date of regulation from 24 to 20, thereby reducing the benchmark channel rate entered on Line 121 of Worksheet 1.

c. Dimension also incorrectly counted its rate-regulated channels as of the initial date of regulation on Form 393, Part I, and on Part II, Worksheet 1 by including channel 54 as half of a rate-regulated channel. Channel 54 carried 12 hours per day of rate-regulated satellite programming (VISN), but also carried 12 hours of pay-per-view programming that is not subject to rate regulation. As discussed above, channels must be categorized as either rate-

regulated or non rate-regulated according to their preponderance of use.[17] We therefore reduce the number of channels on the CPS tier as of the initial date of regulation from 15.5 to 15.

d. At the request of a number of Orange County franchising authorities, including Orange County, Public Knowledge, Inc., a consulting firm retained by these franchising authorities, prepared a report entitled "Review of Dimension Cable Services FCC Form 393 Cable Television Rate Filings Submitted to Several Orange County Franchising Authorities", dated August 29, 1994 ("Public Knowledge Report").[18] This report was incorporated by reference in an order issued by the City of San Clemente reviewing Dimension's basic service rates[19] and was attached to the appeal of that order that Dimension filed with the Commission on October 7, 1994.[20] Based on the report, it is evident that Dimension included $33,703 of franchise fees as part of its equipment revenue in its September 6, 1994 amended Form 393, Part II, Worksheet 2, Line 204. Including franchise fees in Line 204 has the effect of increasing the operator's base rate per channel as of September 30, 1992, which may result in a higher maximum permitted rate. The Commission's rules contemplate recovery of franchise fees as an external cost in addition to the maximum permitted rates calculated on Form 393.[21] If franchise fees are both included in the base from which maximum permitted rates are calculated and permitted as an addition to maximum permitted rates, the operator will be able to recover these costs twice. For this reason, the instructions to Form 393, Worksheet II, Line 204, do not include franchise fees among the items that may be included as equipment revenue.[22]

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[17] *Id.*

[18] The franchising authorities who received a copy of the report prepared by Public Knowledge, Inc. are: City of Dana Point; City of Laguna Hills; City of Laguna Niguel; City of Lake Forest; City of Mission Viejo; City of San Juan Capistrano; City of San Clemente; City of Laguna Beach; and Orange County.

[19] City of San Clemente Resolution No. 94-44 (Sept. 7, 1994).

[20] *See Times Mirror Cable Television of Orange County, Inc., San Clemente, California*, CUID CA0193, DA 94-1334, para. 7d (released Nov. 29, 1994).

[21] 47 C.F.R. § 76.923(k).

[22] Form 393 instructions for Part II, Worksheet 2, Line 204 read as follows: "[t]o calculate your monthly average equipment revenue as of September 20, 1992, take the total revenues you earned over the preceding fiscal year for the community unit for the following categories of equipment and installation services: (1) converter box rental; (2) remote control rental; (3) additional outlet fees; (4) installation fees; (5) disconnect fees; (6) reconnect fees; and (7) tier changing fees."

Accordingly, we remove the $33,703 of franchise fees on equipment revenues from Line 204.[23]

e. In its amended Form 393 filing, Dimension calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of October 1993 using data released by the U.S. Department of Commerce on August 31, 1993. However, Dimension failed to calculate the Inflation Adjustment Factor to at least three decimal places, as required in the instructions to Form 393.[24] Furthermore, because of the errors discussed above Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Dimension filed.[25] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Dimension used in justifying its rates.[26]

8. Because of these errors, we conclude that Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $8.16 (as Dimension calculated in its September 6, 1994 filing) to $7.75.

9. The Public Knowledge Report also reveals that effective September 1, 1993, Dimension assessed on CPS subscribers a charge of $2.64 per month for each additional outlet. Dimension told Public Knowledge, Inc. that this charge was assessed to recover additional programming costs imposed by program suppliers to transmit CPS programming to

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[23] It appears that Dimension has not included franchise fees in its equipment revenue in Part II, Worksheet 1, Line 104 of its September 6, 1994 filing. Therefore, we make no adjustments to the figure in Line 104.

[24] FCC Form 393, page 10, para. 3.

[25] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[26] Our recalculation of the Inflation Adjustment Factor in this case differs from our recalculation in one of the other franchise areas included in the same Form 393 filing due to a difference in the date on which the first valid complaint was served on Dimension. *Cf. Times Mirror Cable Television of Orange County, Inc., San Clemente, California*, CUID No. CA0193, DA 94-1334 (released Nov. 29, 1994).

additional outlets.[27] Under our rules, additional programming costs associated with additional outlets may be recovered as a separate monthly unbundled charge for those outlets.[28] However, Dimension failed to disclose and justify its charge as part of its rate justification before the Commission, as required by the instructions to Form 393.[29] Dimension's additional outlet charge falls within the jurisdiction of the Commission because it is imposed only on CPS subscribers and it allegedly relates solely and directly to the cost of programming that is transmitted on the CPS tier.[30] Because Dimension has failed to justify this charge, we will order it to refund the full amount of the charge collected from subscribers during the period covered by this Order.[31]

Conclusions

10. Upon review of the record herein, we conclude that Dimension's showing supports a maximum reasonable CPS tier price of $7.75 per month (plus franchise fee) for the period February 14, 1994 to May 14, 1994, and that Dimension has failed to justify its additional outlet charge of $2.64 per month.[32] We further determine that we will order an

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[27] Letter from Leo W. Brennan, Vice President and General Manager, Dimension Cable Services to Jay Smith, Public Knowledge, Inc. (Aug. 19, 1994). This letter is attached to the Public Knowledge Report as Exhibit 4.

[28] 47 C.F.R. § 76.923(h).

[29] FCC Form 393, page 29, note 1.

[30] *See* 47 U.S.C. § 543(a)(2)(B). The Public Knowledge Report recommends that local franchising authorities assert jurisdiction over this charge because it is assessed on a per-outlet basis. Public Knowledge Report at 7-8. We agree with Dimension's position, as stated in its appeal of the City of San Clemente's rate order, that this charge falls within the Commission's jurisdiction. We further note the inconsistency between Dimension's position in the appeal that the Commission has jurisdiction over the additional outlet charge and its failure to attempt to justify or even to disclose that charge before the Commission

[31] We note that Public Knowledge, Inc. similarly concluded that Dimension had failed to show that this charge represents incremental costs actually incurred by Dimension for transmitting programming to additional outlets, despite Public Knowledge Inc.'s specific request for information on this issue. Public Knowledge Report at 7.

[32] These findings are based solely on the representations of Dimension listed in paragraph 5, *supra*, and the modifications described in paragraphs 7 and 9, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to

appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the Motion of Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) to dismiss the February 7, 1994 complaint against its cable programming service price charged in Orange County, California, CUID Nos. CA1084, CA1310, CA0675, CA0723, CA1243, CA0719, CA0194, CA0765, and CA1205, IS DENIED.

12. IT IS FURTHER ORDERED, that the February 7, 1994 complaint against the cable programming service price charged by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) in Orange County, California, CUID Nos. CA1084, CA1310, CA0675, CA0723 CA1243, CA0719, CA0194, CA0765, and CA1205 and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of February 14, 1994 to May 14, 1994, justifies a maximum price of $7.75 per month (plus franchise fee) for Times Mirror Cable Television of Orange County, Inc.'s cable programming service tier.

14. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of February 14, 1994 to May 14, 1994, does not justify any separate charge for additional outlets that receive programming on the cable programming services tier.

15. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers that portion of the amounts paid for cable programming service from February 14, 1994[33] to May 14, 1994, that exceeded $7.75 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

16. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc.

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this proceeding not specifically addressed herein.

[33] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

(d/b/a Dimension Cable Services) shall refund to subscribers the additional outlet charge of $2.64 per outlet per month paid by subscribers from February 14, 1994 to May 14, 1994, plus interest to the date of refund.

17. IT IS FURTHER ORDERED, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 21 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNIC ATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
deral Communications Commission
Washington, D.C.

DA 94-1336

In the matter of	)	
	)	
Times Mirror Cable Television of	)	CUID No. CA0316
Orange County, Inc. (d/b/a Dimension	)	
Cable Services)	)	
Laguna Niguel, California	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 28, 1994 Released: November 29, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider complaints about the price Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) ("Dimension") was charging for its cable programming service ("CPS") tier in Laguna Niguel, California, CUID No. CA0316. Dimension has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Dimension's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Dimension has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Dimension implemented its CPS price under the new regulations. See para. 3, *infra*.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

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[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

Procedural Matters

4. The first valid CPS complaint was completed and served on Dimension on November 11, 1993.[11] The Commission received the complaint on November 15, 1993.

5. Dimension filed its first FCC Form 393 for Laguna Niguel, California, CUID No. CA0316, on March 28, 1994.[12] This filing was dated March 16, 1994 and signed on March 19, 1994. Additionally, in response to two Commission letters citing still unresolved deficiencies in Dimension's showings,[13] Dimension amended its justification on August 25, 1994 and again on September 6, 1994. Dimension clarified by telephone that its August 25, 1994 and September 6, 1994 responses to Commission letters apply to all 21 CUID areas listed in "Exhibit A" to its 393 filing, including Laguna Niguel.[14]

Discussion

6. Dimension asserts that its monthly CPS tier price of $8.10 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $8.16 as calculated in its most recent amended filing, dated September 6, 1994. Upon review, however, we have determined that Dimension has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Dimension's calculations in Form 393:

a. Dimension's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) reflect 25 satellite channels. Our examination of the channel line-up that Dimension provided in its August 25, 1994 filing, however, reveals only 23 satellite channels. Dimension apparently either incorrectly double-

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[11] The complaint was dated November 10, 1993, and states that it was mailed to Dimension on November 11, 1993. Dimension has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider November 11, 1993 as the service date.

[12] Dimension's FCC Form 393 filings include several other franchise areas that are served by the same system in addition to Laguna Niguel. Dimension filed substantially identical justifications for all of these franchise areas as to which the Commission received complaints.

[13] Letters from John M. Spencer to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (Aug. 10, 1994 and Aug. 31, 1994).

[14] This representation was memorialized in a letter from Leora Hochstein to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (September 14, 1994), which was served on the relevant complainants and franchising authorities.

counted channels that were divided between two satellite services, or else counted channels that did not carry rate-regulated satellite programming during the majority of programming hours.

A "channel" is defined in the instructions to Form 393 as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. A channel that carries more than one programming service may nonetheless be counted as only one channel. Furthermore, under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or non rate-regulated and as either satellite or non-satellite. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. The preponderance-of-use test is the only one consistent with this conceptual framework. [15]

Dimension's channel line-up for September 30, 1992, lists 20 channels that were each used for one rate-regulated satellite service the entire programming day. An additional three channels were divided between two rate-regulated satellite services: channel 43 was evenly split daily between Bravo and Mind Extension University, channel 44 was evenly split daily between CNBC and the Travel Channel, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. These channels should have been counted as only one satellite channel each, for a total of 23. In addition, Dimension lists three channels that split programming between satellite and non-satellite services: channel 3 carried 15 hours of non-satellite programming titled "Local" and 9 hours of C-Span II, channel 30 carried 17 hours of local Government Access programming and 7 hours of California Channel programming (listed as satellite), and channel 40 was evenly split between KTBN (listed as non-satellite) and VISN (listed as satellite). Because none of these channels carried satellite programming during the majority of programming hours, none should have been counted as a satellite channel. We therefore adjust the number of rate-regulated satellite channels reflected in Worksheet 2 from 25 to 23, reducing the benchmark channel rate entered on Line 220 of Worksheet 2.

b. Similarly, in its calculations in Form 393, Part II, Worksheet 1, Dimension incorrectly counted 24 satellite channels as of the initial date of regulation, even though its channel line-up for September 1, 1993 shows only 20 rate-regulated satellite channels. As in Worksheet 2, Dimension may

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[15] *See Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

incorrectly have double-counted either or both of two channels that were divided between two satellite services: channel 43 was split daily with 10 hours of Bravo and 14 hours of Mind Extension University, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. In addition, three channels may have been counted as satellite even though they did not carry preponderantly rate-regulated satellite-delivered programming: channels 3 and 30 were split in the same manner as in 1992, and channel 54 was evenly split between rate-regulated satellite programming (VISN) and pay-per-view programming that is not subject to rate regulation. We therefore adjust the number of rate-regulated satellite channels on the initial date of regulation from 24 to 20, thereby reducing the benchmark channel rate entered on Line 121 of Worksheet 1.

c. Dimension also incorrectly counted its rate-regulated channels as of the initial date of regulation on Form 393, Part I, and on Part II, Worksheet 1 by including channel 54 as half of a rate-regulated channel. Channel 54 carried 12 hours per day of rate-regulated satellite programming (VISN), but also carried 12 hours of pay-per-view programming that is not subject to rate regulation. As discussed above, channels must be categorized as either rate-regulated or non rate-regulated according to their preponderance of use. [16] We therefore reduce the number of channels on the CPS tier as of the initial date of regulation from 15.5 to 15.

d. At the request of a number of Orange County franchising authorities, including the City of Laguna Niguel, Public Knowledge, Inc., a consulting firm retained by these franchising authorities, prepared a report entitled "Review of Dimension Cable Services FCC Form 393 Cable Television Rate Filings Submitted to Several Orange County Franchising Authorities", dated August 29, 1994.[17] This report was incorporated by reference in an order issued by the City of San Clemente reviewing Dimension's basic service rates[18] and was attached to the appeal of that order that Dimension filed with the Commission on October 7, 1994.[19] Based on the report, it is evident that Dimension included $33,703 of franchise fees as part of its

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[16] *Id.*

[17] The franchising authorities who received a copy of the report prepared by Public Knowledge, Inc. are: City of Dana Point; City of Laguna Hills; City of Laguna Niguel; City of Lake Forest; City of Mission Viejo; City of San Juan Capistrano; City of San Clemente; City of Laguna Beach; and Orange County.

[18] City of San Clemente Resolution No. 94-44 (Sept.7, 1994).

[19] *See Times Mirror Cable Television of Orange County, Inc., San Clemente, California.* CUID CA0193, DA 94-1334, para. 7d (released Nov. 29, 1994).

equipment revenue in its September 6, 1994 amended Form 393, Part II, Worksheet 2, Line 204. Including franchise fees in Line 204 has the effect of increasing the operator's base rate per channel as of September 30, 1992, which may result in a higher maximum permitted rate. The Commission's rules contemplate recovery of franchise fees as an external cost in addition to the maximum permitted rates calculated on Form 393.[20] If franchise fees are both included in the base from which maximum permitted rates are calculated and permitted as an addition to maximum permitted rates, the operator will be able to recover these costs twice. For this reason, the instructions to Form 393, Worksheet II, Line 204, do not include franchise fees among the items that may be included as equipment revenue.[21] Accordingly, we remove the $33,703 of franchise fees on equipment revenues from Line 204.[22]

e. In its amended Form 393 filing, Dimension calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of October 1993 using data released by the U.S. Department of Commerce on August 31, 1993. However, Dimension failed to calculate the Inflation Adjustment Factor to at least three decimal places, as required in the instructions to Form 393.[23] Furthermore, because of the errors discussed above Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Dimension filed.[24] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the

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[20] 47 C.F.R. § 76.923(k).

[21] Form 393 instructions for Part II, Worksheet 2, Line 204 read as follows: "[t]o calculate your monthly average equipment revenue as of September 20, 1992, take the total revenues you earned over the preceding fiscal year for the community unit for the following categories of equipment and installation services: (1) converter box rental; (2) remote control rental; (3) additional outlet fees; (4) installation fees; (5) disconnect fees; (6) reconnect fees; and (7) tier changing fees."

[22] It appears that Dimension has not included franchise fees in its equipment revenue in Part II, Worksheet 1, Line 104 of its September 6, 1994 filing. Therefore, we make no adjustments to the figure in Line 104.

[23] FCC Form 393, page 10, para. 3.

[24] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

Inflation Adjustment Factor through October 1993, the base date Dimension used in justifying its rates.[25]

7. Because of these errors, we conclude that Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $8.16 (as Dimension calculated in its September 6, 1994 filing) to $7.75.

8. The Public Knowledge Report also reveals that effective September 1, 1993, Dimension assessed on CPS subscribers a charge of $2.64 per month for each additional outlet. Dimension told Public Knowledge, Inc. that this charge was assessed to recover additional programming costs imposed by program suppliers to transmit CPS programming to additional outlets.[26] Under our rules, additional programming costs associated with additional outlets may be recovered as a separate monthly unbundled charge for those outlets.[27] However, Dimension failed to disclose and justify its charge as part of its rate justification before the Commission, as required by the instructions to Form 393.[28] Dimension's additional outlet charge falls within the jurisdiction of the Commission because it is imposed only on CPS subscribers and it allegedly relates solely and directly to the cost of programming that is transmitted on the CPS tier.[29] Because Dimension has failed to justify

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[25] Our recalculation of the Inflation Adjustment Factor in this case differs from our recalculation in one of the other franchise areas included in the same Form 393 filing due to a difference in the date on which the first valid complaint was served on Dimension. *Cf. Times Mirror Cable Television of Orange County, Inc., San Clemente, California*, CUID No. CA0193, DA 94-1334 (released Nov. 29, 1994).

[26] Letter from Leo W. Brennan, Vice President and General Manager, Dimension Cable Services to Jay Smith, Public Knowledge, Inc. (Aug. 19, 1994). This letter is attached to the Public Knowledge Report as Exhibit 4.

[27] 47 C.F.R. § 76.923(h).

[28] FCC Form 393, page 29, note 1.

[29] *See* 47 U.S.C. § 543(a)(2)(B). The Public Knowledge Report recommends that local franchising authorities assert jurisdiction over this charge because it is assessed on a per-outlet basis. Public Knowledge Report at 7-8. We agree with Dimension's position, as stated in its appeal of the City of San Clemente's rate order, that this charge falls within the Commission's jurisdiction. We further note the inconsistency between Dimension's position in the appeal that the Commission has jurisdiction over the additional outlet charge and its failure to attempt to justify or even to disclose that charge before the Commission.

this charge, we will order it to refund the full amount of the charge collected from subscribers during the period covered by this Order.[30]

Conclusions

9. Upon review of the record herein, we conclude that Dimension's showing supports a maximum reasonable CPS tier price of $7.75 per month (plus franchise fee) for the period November 15, 1993 to May 14, 1994, and that Dimension has failed to justify its additional outlet charge of $2.64 per month.[31] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the November 11, 1993 complaint against the cable programming service price charged by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) in Laguna Niguel, California, CUID No. CA0136 and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of November 15, 1993 to May 14, 1994, justifies a maximum price of $7.75 per month (plus franchise fee) for Times Mirror Cable Television of Orange County, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of November 15, 1993 to May 14, 1994, does not justify any separate charge for additional outlets that receive programming on the cable programming services tier.

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[30] We note that Public Knowledge, Inc. similarly concluded that Dimension had failed to show that this charge represents incremental costs actually incurred by Dimension for transmitting programming to additional outlets, despite Public Knowledge Inc.'s specific request for information on this issue. Public Knowledge Report at 7.

[31] These findings are based solely on the representations of Dimension listed in paragraph 5, *supra*, and the modifications described in paragraphs 6 and 8, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers that portion of the amounts paid for cable programming service from November 15, 1993[32] to May 14, 1994, that exceeded $7.75 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers the additional outlet charge of $2.64 per outlet per month paid by subscribers from November 15, 1993 to May 14, 1994, plus interest to the date of refund.

15. IT IS FURTHER ORDERED, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 21 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones

Meredith J. Jones
Chief, Cable Services Bureau

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[32] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1337

In the matter of	)	
	)	
Times Mirror Cable Television of	)	CUID Nos. CA0549 and CA0652
Orange County, Inc. (d/b/a Dimension	)	
Cable Services)	)	
Dana Point, California	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 28, 1994 Released: November 29, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider complaints about the price Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) ("Dimension") was charging for its cable programming service ("CPS") tier in Dana Point, California, CUID Nos. CA0549 and CA0652.[1] Dimension has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Dimension's price only

[1] According to Dimension, CUID numbers CA0549 and CA0652 together constitute a single franchise area. Facsimile from Mark Stucky, Dimension Cable Services, to Leora Hochstein (Sept. 7, 1994). Thus, the Commission's receipt of a valid complaint from a subscriber living in either of these CUID areas gives the Commission jurisdiction over Dimension's price for the CPS tier throughout the franchise area. *See* 47 C.F.R. § 984(a) (prices must be uniform throughout a franchise area).

through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC

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[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Dimension has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Dimension implemented its CPS price under the new regulations. See para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.

Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

Procedural Matters

4. The first valid CPS complaint was completed and served on Dimension on October 4, 1993.[12] The Commission received the complaint on October 8, 1993. (Dimension disputes the validity of subsequent complaints filed by other cable subscribers. Because we have accepted this complaint as properly filed, we find it unnecessary to rule on Dimension's objections to these later filed complaints.)

5. Dimension filed its first FCC Form 393 for Dana Point, California, CUID Nos. CA0549 and CA0652, on December 16, 1993.[13] This filing was dated November 22, 1993 and signed on December 10, 1993. The Commission received a second 393 filing on March 28, 1994. This filing was dated March 16, 1994 and signed on March 21, 1994. The Commission received a third 393 filing on May 31, 1994, which was dated November 22, 1993 and signed on May 26, 1994. Additionally, in response to two Commission letters citing still unresolved deficiencies in Dimension's showings,[14] Dimension amended its justification on August 25, 1994 and again on September 6, 1994. Dimension clarified by telephone that its August 25, 1994 and September 6, 1994 responses to Commission letters apply to all 21 CUID areas listed in "Exhibit A" to its 393 filing, including Dana Point.[15]

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[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[12] The complaint was dated October 4, 1993, and states that it was mailed to Dimension on that date. Dimension has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider October 4, 1993 as the service date.

[13] Dimension's FCC Form 393 filings include several other franchise areas that are served by the same system in addition to Dana Point. Dimension filed substantially identical justifications for all of these franchise areas as to which the Commission received complaints.

[14] Letters from John M. Spencer to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (Aug. 10, 1994 and Aug. 31, 1994).

[15] This representation was memorialized in a letter from Leora Hochstein to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (September 14, 1994), which was served on the relevant complainants and franchising authorities.

Discussion

6. Dimension asserts that its monthly CPS tier price of $8.10 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $8.16 as calculated in its most recent amended filing, dated September 6, 1994. Upon review, however, we have determined that Dimension has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Dimension's calculations in Form 393:

a. Dimension's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) reflect 25 satellite channels. Our examination of the channel line-up that Dimension provided in its August 25, 1994 filing, however, reveals only 23 satellite channels. Dimension apparently either incorrectly double-counted channels that were divided between two satellite services, or else counted channels that did not carry rate-regulated satellite programming during the majority of programming hours.

A "channel" is defined in the instructions to Form 393 as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. A channel that carries more than one programming service may nonetheless be counted as only one channel. Furthermore, under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or non rate-regulated and as either satellite or non-satellite. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. The preponderance-of-use test is the only one consistent with this conceptual framework.[16]

Dimension's channel line-up for September 30, 1992, lists 20 channels that were each used for one rate-regulated satellite service the entire programming day. An additional three channels were divided between two rate-regulated satellite services: channel 43 was evenly split daily between Bravo and Mind Extension University, channel 44 was evenly split daily between CNBC and the Travel Channel, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. These channels should have been counted as only one satellite channel each, for a total of 23. In addition, Dimension lists three channels that split programming between satellite and non-satellite services: channel 3 carried 15 hours of non-satellite

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[16] *See Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

programming titled "Local" and 9 hours of C-Span II, channel 30 carried 17 hours of local Government Access programming and 7 hours of California Channel programming (listed as satellite), and channel 40 was evenly split between KTBN (listed as non-satellite) and VISN (listed as satellite). Because none of these channels carried satellite programming during the majority of programming hours, none should have been counted as a satellite channel. We therefore adjust the number of rate-regulated satellite channels reflected in Worksheet 2 from 25 to 23, reducing the benchmark channel rate entered on Line 220 of Worksheet 2.

b. Similarly, in its calculations in Form 393, Part II, Worksheet 1, Dimension incorrectly counted 24 satellite channels as of the initial date of regulation, even though its channel line-up for September 1, 1993 shows only 20 rate-regulated satellite channels. As in Worksheet 2, Dimension may incorrectly have double-counted either or both of two channels that were divided between two satellite services: channel 43 was split daily with 10 hours of Bravo and 14 hours of Mind Extension University, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. In addition, three channels may have been counted as satellite even though they did not carry preponderantly rate-regulated satellite-delivered programming: channels 3 and 30 were split in the same manner as in 1992, and channel 54 was evenly split between rate-regulated satellite programming (VISN) and pay-per-view programming that is not subject to rate regulation. We therefore adjust the number of rate-regulated satellite channels on the initial date of regulation from 24 to 20, thereby reducing the benchmark channel rate entered on Line 121 of Worksheet 1.

c. Dimension also incorrectly counted its rate-regulated channels as of the initial date of regulation on Form 393, Part I, and on Part II, Worksheet 1 by including channel 54 as half of a rate-regulated channel. Channel 54 carried 12 hours per day of rate-regulated satellite programming (VISN), but also carried 12 hours of pay-per-view programming that is not subject to rate regulation. As discussed above, channels must be categorized as either rate-regulated or non rate-regulated according to their preponderance of use.[17] We therefore reduce the number of channels on the CPS tier as of the initial date of regulation from 15.5 to 15.

d. At the request of a number of Orange County franchising authorities, including the City of Dana Point, Public Knowledge, Inc., a consulting firm retained by these franchising authorities, prepared a report entitled "Review of Dimension Cable Services FCC Form 393 Cable Television Rate Filings Submitted to Several

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[17] *Id.*

Orange County Franchising Authorities", dated August 29, 1994 ("Public Knowledge Report").[18] This report was incorporated by reference in an order issued by the City of San Clemente reviewing Dimension's basic service rates[19] and was attached to the appeal of that order that Dimension filed with the Commission on October 7, 1994.[20] Based on the report, it is evident that Dimension included $33,703 of franchise fees as part of its equipment revenue in its September 6, 1994 amended Form 393, Part II, Worksheet 2, Line 204. Including franchise fees in Line 204 has the effect of increasing the operator's base rate per channel as of September 30, 1992, which may result in a higher maximum permitted rate. The Commission's rules contemplate recovery of franchise fees as an external cost in addition to the maximum permitted rates calculated on Form 393.[21] If franchise fees are both included in the base from which maximum permitted rates are calculated and permitted as an addition to maximum permitted rates, the operator will be able to recover these costs twice. For this reason, the instructions to Form 393, Worksheet II, Line 204, do not include franchise fees among the items that may be included as equipment revenue.[22] Accordingly, we remove the $33,703 of franchise fees on equipment revenues from Line 204.[23]

e. In its amended Form 393 filing, Dimension calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of October 1993 using data released by the U.S. Department of Commerce on August 31,

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[18] The franchising authorities who received a copy of the Public Knowledge Report are: City of Dana Point; City of Laguna Hills; City of Laguna Niguel; City of Lake Forest; City of Mission Viejo; City of San Juan Capistrano; City of San Clemente; City of Laguna Beach; and Orange County.

[19] City of San Clemente Resolution No. 94-44 (Sept. 7, 1994).

[20] *See Times Mirror Cablevision of Orange County, Inc., San Clemente, California*, CUID No. CA0193, DA 94-1334, para. 7d (released Nov. 29, 1994).

[21] 47 C.F.R. § 76.923(k).

[22] Form 393 instructions for Part II, Worksheet 2, Line 204 read as follows: "[t]o calculate your monthly average equipment revenue as of September 20, 1992, take the total revenues you earned over the preceding fiscal year for the community unit for the following categories of equipment and installation services: (1) converter box rental; (2) remote control rental; (3) additional outlet fees; (4) installation fees; (5) disconnect fees; (6) reconnect fees; and (7) tier changing fees."

[23] It appears that Dimension has not included franchise fees in its equipment revenue in Part II, Worksheet 1, Line 104 of its September 6, 1994 filing. Therefore, we make no adjustments to the figure in Line 104.

1993. However, Dimension failed to calculate the Inflation Adjustment Factor to at least three decimal places, as required in the instructions to Form 393.[24] Furthermore, because of the errors discussed above Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Dimension filed.[25] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Dimension used in justifying its rates.[26]

7. Because of these errors, we conclude that Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $8.16 (as Dimension calculated in its September 6, 1994 filing) to $7.75.

8. The Public Knowledge Report also reveals that effective September 1, 1993, Dimension assessed on CPS subscribers a charge of $2.64 per month for each additional outlet. Dimension told Public Knowledge, Inc. that this charge was assessed to recover additional programming costs imposed by program suppliers to transmit CPS programming to additional outlets.[27] Under our rules, additional programming costs associated with additional outlets may be recovered as a separate monthly unbundled charge for these outlets.[28] However, Dimension failed to disclose and justify its charge as part of its rate justification

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[24] FCC Form 393, page 10, para. 3.

[25] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[26] Our recalculation of the Inflation Adjustment Factor in this case differs from our recalculation in one of the other franchise areas included in the same Form 393 filing due to a difference in the date on which the first valid complaint was served on Dimension. *Cf. Times Mirror Cable Television of Orange County, Inc., San Clemente, California*, CUID No. CA0193, DA 94-1334 (released Nov. 29, 1994).

[27] Letter from Leo W. Brennan, Vice President and General Manager, Dimension Cable Services to Jay Smith, Public Knowledge, Inc. (Aug. 19, 1994). This letter is attached to the Public Knowledge Report as Exhibit 4.

[28] 47 C.F.R. § 76.923(h).

before the Commission, as required by the instructions to Form 393.[29] Dimension's additional outlet charge falls within the jurisdiction of the Commission because it is imposed only on CPS subscribers and it allegedly relates solely and directly to the cost of programming that is transmitted on the CPS tier.[30] Because Dimension has failed to justify this charge, we will order it to refund the full amount of the charge collected from subscribers during the period covered by this Order.[31]

Conclusions

9. Upon review of the record herein, we conclude that Dimension's showing supports a maximum reasonable CPS tier price of $7.75 per month (plus franchise fee) for the period October 8, 1993 to May 14, 1994, and that Dimension has failed to justify its additional outlet charge of $2.64 per month.[32] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 4, 1993 complaint against the cable programming service price charged by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) in Dana Point, California, CUID Nos. CA0549 and CA0652, and

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[29] FCC Form 393, page 29, note 1.

[30] *See* 47 U.S.C. § 543(a)(2)(B). The Public Knowledge Report recommends that local franchising authorities assert jurisdiction over this charge because it is assessed on a per-outlet basis. Public Knowledge Report at 7-8. We agree with Dimension's position, as stated in its appeal of the City of San Clemente's rate order, that this charge falls within the Commission's jurisdiction. We further note the inconsistency between Dimension's position in the appeal that the Commission has jurisdiction over the additional outlet charge and its failure to attempt to justify or even to disclose that charge before the Commission.

[31] We note that Public Knowledge, Inc. similarly concluded that Dimension had failed to show that this charge represents incremental costs actually incurred by Dimension for transmitting programming to additional outlets, despite Public Knowledge Inc.'s specific request for information on this issue. Public Knowledge Report at 7.

[32] These findings are based solely on the representations of Dimension listed in paragraph 5, *supra*, and the modifications described in paragraphs 6 and 8, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

11. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of October 8, 1993 to May 14, 1994, justifies a maximum price of $7.75 per month (plus franchise fee) for Times Mirror Cable Television of Orange County, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of October 8, 1993 to May 14, 1994, does not justify any separate charge for additional outlets that receive programming on the cable programming services tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers that portion of the amounts paid for cable programming service from October 8, 1993[33] to May 14, 1994, that exceeded $7.75 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers the additional outlet charge of $2.64 per outlet per month paid by subscribers from October 8, 1993 to May 14, 1994, plus interest to the date of refund.

15. IT IS FURTHER ORDERED, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 21 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[33] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1338

In the matter of	)	
	)	
Times Mirror Cable Television of	)	CUID No. CA1070
Orange County, Inc. (d/b/a Dimension	)	
Cable Services)	)	
Lake Forest, California	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 28, 1994 Released: November 29, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider complaints about the price Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) ("Dimension") was charging for its cable programming service ("CPS") tier in Lake Forest, California, CUID No. CA1070. Dimension has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Dimension's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Dimension has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Dimension implemented its CPS price under the new regulations. See para. 3, *infra*.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

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[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

Procedural Matters

4. The first valid CPS complaint was completed and served on Dimension on October 22, 1993.[11] The Commission received the complaint on October 25, 1993.

5. Dimension filed its first FCC Form 393 for Lake Forest, California, CUID No. CA1070, on November 15, 1993.[12] This filing was dated November 9, 1993 and signed on November 10, 1993. The Commission received a second 393 filing on June 1, 1994, which was dated November 9, 1993 and signed on May 26, 1994. Additionally, in response to two Commission letters citing still unresolved deficiencies in Dimension's showings,[13] Dimension amended its justification on August 25, 1994 and again on September 6, 1994. Dimension clarified by telephone that its August 25, 1994 and September 6, 1994 responses to Commission letters apply to all 21 CUID areas listed in "Exhibit A" to its 393 filing, including Lake Forest.[14]

6. On November 15, 1993, Dimension filed a Motion to Dismiss the complaint postmarked October 22, 1993. In its motion, Dimension requests that the Commission dismiss the complaint for a number of reasons. First, Dimension asserts that the complainant incorrectly answered question number 9 on FCC Form 329 as it then existed, both because he failed to identify the programming service for which the complaint was filed and because he listed channels in his complaint that were sold on the basic service tier and on a per channel basis as well as channels that were offered on the CPS tier. In addition, Dimension urges the Commission to find the complaint deficient on the ground that the complainant failed to identify accurately the date the complaint was mailed to the operator in his answer to question

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[11] The complaint was dated October 11, 1993, and states that it was mailed to Dimension on that date. However, as Dimension points out in its Motion to Dismiss, the postmark date on the envelope addressed to the operator from the complainant is October 22, 1993. Under these circumstances we will consider October 22, 1993 as the service date.

[12] Dimension's FCC Form 393 filings include several other franchise areas that are served by the same system in addition to Lake Forest. Dimension filed substantially identical justifications for all of these franchise areas as to which the Commission received complaints.

[13] Letters from John M. Spencer to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (Aug. 10, 1994 and Aug. 31, 1994).

[14] This representation was memorialized in a letter from Leora Hochstein to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (September 14, 1994), which was served on the relevant complainants and franchising authorities.

number 12.[15] Dimension's assertions do not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the complainant's response to question number 9 includes channels contained on the CPS tier and because the rates listed in answer number 8 and on the attached bill indicate that the complainant received the CPS tier, we find it reasonable to conclude that the complainant objected to the CPS tier rate and that he believed that rate was unreasonable.[16] We therefore find the complaint postmarked October 22, 1993 valid and deny Dimension's Motion to Dismiss.

Discussion

7. Dimension asserts that its monthly CPS tier price of $8.10 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $8.16 as calculated in its most recent amended filing, dated September 6, 1994. Upon review, however, we have determined that Dimension has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Dimension's calculations in Form 393:

a. Dimension's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) reflect 25 satellite channels. Our examination of the channel line-up that Dimension provided in its August 25, 1994 filing, however, reveals only 23 satellite channels. Dimension apparently either incorrectly double-counted channels that were divided between two satellite services, or else counted channels that did not carry rate-regulated satellite programming during the majority of programming hours.

A "channel" is defined in the instructions to Form 393 as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. A channel that carries more than one programming service may nonetheless be counted as only one channel. Furthermore, under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or non rate-regulated and as either satellite or non-satellite. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based

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[15] The complaint indicates that the form was mailed on October 11, 1993, while the envelope addressed to the operator from the complainant shows a postmark of October 22, 1993.

[16] We note that in January 1994 the Commission released a revised Form 329 that omitted question 9.

on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. The preponderance-of-use test is the only one consistent with this conceptual framework.[17]

Dimension's channel line-up for September 30, 1992, lists 20 channels that were each used for one rate-regulated satellite service the entire programming day. An additional three channels were divided between two rate-regulated satellite services: channel 43 was evenly split daily between Bravo and Mind Extension University, channel 44 was evenly split daily between CNBC and the Travel Channel, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. These channels should have been counted as only one satellite channel each, for a total of 23. In addition, Dimension lists three channels that split programming between satellite and non-satellite services: channel 3 carried 15 hours of non-satellite programming titled "Local" and 9 hours of C-Span II, channel 30 carried 17 hours of local Government Access programming and 7 hours of California Channel programming (listed as satellite), and channel 40 was evenly split between KTBN (listed as non-satellite) and VISN (listed as satellite). Because none of these channels carried satellite programming during the majority of programming hours, none should have been counted as a satellite channel. We therefore adjust the number of rate-regulated satellite channels reflected in Worksheet 2 from 25 to 23, reducing the benchmark channel rate entered on Line 220 of Worksheet 2.

b. Similarly, in its calculations in Form 393, Part II, Worksheet 1, Dimension incorrectly counted 24 satellite channels as of the initial date of regulation, even though its channel line-up for September 1, 1993 shows only 20 rate-regulated satellite channels. As in Worksheet 2, Dimension may incorrectly have double-counted either or both of two channels that were divided between two satellite services: channel 43 was split daily with 10 hours of Bravo and 14 hours of Mind Extension University, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. In addition, three channels may have been counted as satellite even though they did not carry preponderantly rate-regulated satellite-delivered programming: channels 3 and 30 were split in the same manner as in 1992, and channel 54 was evenly split between rate-regulated satellite programming (VISN) and pay-per-view programming that is not subject to rate regulation. We therefore adjust the number of rate-regulated satellite channels on the initial date of regulation from 24 to 20, thereby reducing the benchmark channel rate entered on Line 121 of Worksheet 1.

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[17] *See Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

c. Dimension also incorrectly counted its rate-regulated channels as of the initial date of regulation on Form 393, Part I, and on Part II, Worksheet 1 by including channel 54 as half of a rate-regulated channel. Channel 54 carried 12 hours per day of rate-regulated satellite programming (VISN), but also carried 12 hours of pay-per-view programming that is not subject to rate regulation. As discussed above, channels must be categorized as either rate-regulated or non rate-regulated according to their preponderance of use.[18] We therefore reduce the number of channels on the CPS tier as of the initial date of regulation from 15.5 to 15.

d. At the request of a number of Orange County franchising authorities, including the City of Lake Forest, Public Knowledge, Inc., a consulting firm retained by these franchising authorities, prepared a report entitled "Review of Dimension Cable Services FCC Form 393 Cable Television Rate Filings Submitted to Several Orange County Franchising Authorities", dated August 29, 1994 ("Public Knowledge Report").[19] This report was incorporated by reference in an order issued by the City of San Clemente reviewing Dimension's basic service rates[20] and was attached to the appeal of that order that Dimension filed with the Commission on October 7, 1994.[21] Based on the report, it is evident that Dimension included $33,703 of franchise fees as part of its equipment revenue in its September 6, 1994 amended Form 393, Part II, Worksheet 2, Line 204. Including franchise fees in Line 204 has the effect of increasing the operator's base rate per channel as of September 30, 1992, which may result in a higher maximum permitted rate. The Commission's rules contemplate recovery of franchise fees as an external cost in addition to the maximum permitted rates calculated on Form 393.[22] If franchise fees are both included in the base from which maximum permitted rates are calculated and permitted as an addition to maximum permitted rates, the operator will be able to recover these costs twice. For this reason, the instructions to Form 393, Worksheet II, Line 204, do not include

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[18] *Id.*

[19] The franchising authorities who received a copy of the Public Knowledge Report are: City of Dana Point; City of Laguna Hills; City of Laguna Niguel; City of Lake Forest; City of Mission Viejo; City of San Juan Capistrano; City of San Clemente; City of Laguna Beach; and Orange County.

[20] City of San Clemente Resolution No. 94-44 (Sept. 7, 1994).

[21] *See Times Mirror Cablevision of Orange County, Inc., San Clemente, California*, CUID No. CA0193, DA 94-1334, para. 7d (released Nov. 29, 1994).

[22] 47 C.F.R. § 76.923(k).

franchise fees among the items that may be included as equipment revenue.[23] Accordingly, we remove the $33,703 of franchise fees on equipment revenues from Line 204.[24]

e. In its amended Form 393 filing, Dimension calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of October 1993 using data released by the U.S. Department of Commerce on August 31, 1993. However, Dimension failed to calculate the Inflation Adjustment Factor to at least three decimal places, as required in the instructions to Form 393.[25] Furthermore, because of the errors discussed above Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Dimension filed.[26] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Dimension used in justifying its rates.[27]

8. Because of these errors, we conclude that Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect

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[23] Form 393 instructions for Part II, Worksheet 2, Line 204 read as follows: "[t]o calculate your monthly average equipment revenue as of September 20, 1992, take the total revenues you earned over the preceding fiscal year for the community unit for the following categories of equipment and installation services: (1) converter box rental; (2) remote control rental; (3) additional outlet fees; (4) installation fees; (5) disconnect fees; (6) reconnect fees; and (7) tier changing fees."

[24] It appears that Dimension has not included franchise fees in its equipment revenue in Part II, Worksheet 1, Line 104 of its September 6, 1994 filing. Therefore, we make no adjustments to the figure in Line 104.

[25] FCC Form 393, page 10, para. 3.

[26] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[27] Our recalculation of the Inflation Adjustment Factor in this case differs from our recalculation in one of the other franchise areas included in the same Form 393 filing due to a difference in the date on which the first valid complaint was served on Dimension. *Cf. Times Mirror Cable Television of Orange County, Inc., San Clemente, California*, CUID No. CA0193, DA 94-1334 (released Nov. 29, 1994).

of reducing the maximum permitted monthly CPS tier price from $8.16 (as Dimension calculated in its September 6, 1994 filing) to $7.75.

9. The Public Knowledge Report also reveals that effective September 1, 1993, Dimension assessed on CPS subscribers a charge of $2.64 per month for each additional outlet. Dimension told Public Knowledge, Inc. that this charge was assessed to recover additional programming costs imposed by program suppliers to transmit CPS programming to additional outlets.[28] Under our rules, additional programming costs associated with additional outlets may be recovered as a separate monthly unbundled charge for those outlets.[29] However, Dimension failed to disclose and justify its charge as part of its rate justification before the Commission, as required by the instructions to Form 393.[30] Dimension's additional outlet charge falls within the jurisdiction of the Commission because it is imposed only on CPS subscribers and it allegedly relates solely and directly to the cost of programming that is transmitted on the CPS tier.[31] Because Dimension has failed to justify this charge, we will order it to refund the full amount of the charge collected from subscribers during the period covered by this Order.[32]

Conclusions

10. Upon review of the record herein, we conclude that Dimension's showing supports a maximum reasonable CPS tier price of $7.75 per month (plus franchise fee) for the period October 25, 1993 to May 14, 1994, and that Dimension has failed to justify its

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[28] Letter from Leo W. Brennan, Vice President and General Manager, Dimension Cable Services to Jay Smith, Public Knowledge, Inc. (Aug. 19, 1994). This letter is attached to the Public Knowledge Report as Exhibit 4.

[29] 47 C.F.R. § 76.923(h).

[30] FCC Form 393, page 29, note 1.

[31] *See* 47 U.S.C. § 543(a)(2)(B). The Public Knowledge Report recommends that local franchising authorities assert jurisdiction over this charge because it is assessed on a per-outlet basis. Public Knowledge Report at 7-8. We agree with Dimension's position, as stated in its appeal of the City of San Clemente's rate order, that this charge falls within the Commission's jurisdiction. We further note the inconsistency between Dimension's position in the appeal that the Commission has jurisdiction over the additional outlet charge and its failure to attempt to justify or even to disclose that charge before the Commission.

[32] We note that Public Knowledge, Inc. similarly concluded that Dimension had failed to show that this charge represents incremental costs actually incurred by Dimension for transmitting programming to additional outlets, despite Public Knowledge Inc.'s specific request for information on this issue. Public Knowledge Report at 7.

additional outlet charge of $2.64 per month.[33] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the Motion of Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) to dismiss the October 22, 1993 complaint against its cable programming service price charged in Lake Forest, California, CUID No. CA1070, IS DENIED.

12. IT IS FURTHER ORDERED, that the October 22, 1993 complaint against the cable programming service price charged by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) in Lake Forest, California, CUID No. CA1070, and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of October 25, 1993 to May 14, 1994, justifies a maximum price of $7.75 per month (plus franchise fee) for Times Mirror Cable Television of Orange County, Inc.'s cable programming service tier.

14. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of October 25, 1993 to May 14, 1994, does not justify any separate charge for additional outlets that receive programming on the cable programming services tier.

15. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers that portion of the amounts paid for cable programming service from October 25, 1993[34] to May 14, 1994, that exceeded

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[33] These findings are based solely on the representations of Dimension listed in paragraph 5, *supra*, and the modifications described in paragraphs 7 and 9, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

[34] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

$7.75 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

16. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers the additional outlet charge of $2.64 per outlet per month paid by subscribers from October 25, 1993 to May 14, 1994, plus interest to the date of refund.

17. IT IS FURTHER ORDERED, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 21 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1339

In the matter of	)	
	)	
Times Mirror Cable Television of	)	CUID Nos. CA0192 and CA1345
Orange County, Inc. (d/b/a Dimension	)	
Cable Services)	)	
Mission Viejo, California	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 28, 1994 Released: November 29, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider a complaint about the price Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) ("Dimension") was charging for its cable programming service ("CPS") tier in Mission Viejo, California, CUID Nos. CA0192 and CA1345.[1] Dimension has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Dimension's price

[1] According to Dimension, CUID numbers CA0192 and CA1345 together constitute a single franchise area. Facsimile from Mark Stucky, Dimension Cable Services, to Leora Hochstein (Sept. 7, 1994). Thus, the Commission's receipt of a valid complaint from a subscriber living in either of these CUID areas gives the Commission jurisdiction over Dimension's price for the CPS tier throughout the franchise area. *See* 47 C.F.R. § 984(a) (prices must be uniform throughout a franchise area).

only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[2]

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[3] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[4] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[5] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[6]

3. The Commission's original rate regulations took effect on September 1, 1993.[7] The Commission subsequently revised its rate regulations effective May 15, 1994.[8] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[9] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC

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[2] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Dimension has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Dimension implemented its CPS price under the new regulations. See para. 3, *infra*.

[3] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[4] 47 C.F.R. § 76.956.

[5] 47 C.F.R. § 76.956(b).

[6] *Id.*

[7] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[8] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[9] *See Second Order on Reconsideration* at 4190, paras. 150-152.

Form 393.[10] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[11]

Procedural Matters

4. The first valid CPS complaint was completed and served on Dimension on October 13, 1993.[12] The Commission received the complaint on October 14, 1993.

5. Dimension filed its first FCC Form 393 for Mission Viejo, California, CUID Nos. CA0192 and CA1345, on November 15, 1993.[13] This filing was dated November 9, 1993 and signed on November 10, 1993. The Commission received a second 393 filing on May 31, 1994 which was dated November 9, 1993 and signed on May 26, 1994. Additionally, in response to two Commission letters citing still unresolved deficiencies in Dimension's showings,[14] Dimension amended its justification on August 25, 1994 and again on September 6, 1994. Dimension clarified by telephone that its August 25, 1994 and September 6, 1994 responses to Commission letters apply to all 21 CUID areas listed in "Exhibit A" to its 393 filing, including Mission Viejo.[15]

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[10] *Id.*

[11] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

[12] The complaint was dated October 13, 1993, and states that it was mailed to Dimension on that date. Dimension has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider October 13, 1993 as the service date.

[13] Dimension's FCC Form 393 filings include several other franchise areas that are served by the same system in addition to Mission Viejo. Dimension filed substantially identical justifications for all of these franchise areas as to which the Commission received complaints.

[14] Letters from John M. Spencer to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (Aug. 10, 1994 and Aug. 31, 1994).

[15] This representation was memorialized in a letter from Leora Hochstein to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (September 14, 1994), which was served on the relevant complainants and franchising authorities.

Discussion

6. Dimension asserts that its monthly CPS tier price of $8.10 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $8.16 as calculated in its most recent amended filing, dated September 6, 1994. Upon review, however, we have determined that Dimension has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Dimension's calculations in Form 393:

a. Dimension's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) reflect 25 satellite channels. Our examination of the channel line-up that Dimension provided in its August 25, 1994 filing, however, reveals only 23 satellite channels. Dimension apparently either incorrectly double-counted channels that were divided between two satellite services, or else counted channels that did not carry rate-regulated satellite programming during the majority of programming hours.

A "channel" is defined in the instructions to Form 393 as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. A channel that carries more than one programming service may nonetheless be counted as only one channel. Furthermore, under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or non rate-regulated and as either satellite or non-satellite. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. The preponderance-of-use test is the only one consistent with this conceptual framework.[16]

Dimension's channel line-up for September 30, 1992, lists 20 channels that were each used for one rate-regulated satellite service the entire programming day. An additional three channels were divided between two rate-regulated satellite services: channel 43 was evenly split daily between Bravo and Mind Extension University, channel 44 was evenly split daily between CNBC and the Travel Channel, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. These channels should have been counted as only one satellite channel each, for a total of 23. In addition, Dimension lists three channels that split programming between satellite and non-satellite services: channel 3 carried 15 hours of non-satellite programming titled "Local" and 9 hours of C-Span II, channel 30 carried 17

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[16] *See Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

hours of local Government Access programming and 7 hours of California Channel programming (listed as satellite), and channel 40 was evenly split between KTBN (listed as non-satellite) and VISN (listed as satellite). Because none of these channels carried satellite programming during the majority of programming hours, none should have been counted as a satellite channel. We therefore adjust the number of rate-regulated satellite channels reflected in Worksheet 2 from 25 to 23, reducing the benchmark channel rate entered on Line 220 of Worksheet 2.

b. Similarly, in its calculations in Form 393, Part II, Worksheet 1, Dimension incorrectly counted 24 satellite channels as of the initial date of regulation, even though its channel line-up for September 1, 1993 shows only 20 rate-regulated satellite channels. As in Worksheet 2, Dimension may incorrectly have double-counted either or both of two channels that were divided between two satellite services: channel 43 was split daily with 10 hours of Bravo and 14 hours of Mind Extension University, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. In addition, three channels may have been counted as satellite even though they did not carry preponderantly rate-regulated satellite-delivered programming: channels 3 and 30 were split in the same manner as in 1992, and channel 54 was evenly split between rate-regulated satellite programming (VISN) and pay-per-view programming that is not subject to rate regulation. We therefore adjust the number of rate-regulated satellite channels on the initial date of regulation from 24 to 20, thereby reducing the benchmark channel rate entered on Line 121 of Worksheet 1.

c. Dimension also incorrectly counted its rate-regulated channels as of the initial date of regulation on Form 393, Part I, and on Part II, Worksheet 1 by including channel 54 as half of a rate-regulated channel. Channel 54 carried 12 hours per day of rate-regulated satellite programming (VISN), but also carried 12 hours of pay-per-view programming that is not subject to rate regulation. As discussed above, channels must be categorized as either rate-regulated or non rate-regulated according to their preponderance of use.[17] We therefore reduce the number of channels on the CPS tier as of the initial date of regulation from 15.5 to 15.

d. At the request of a number of Orange County franchising authorities, including the City of Mission Viejo, Public Knowledge, Inc., a consulting firm retained by these franchising authorities, prepared a report entitled "Review of Dimension Cable Services FCC Form 393 Cable Television Rate Filings Submitted to Several Orange County Franchising Authorities", dated August 29, 1994 ("Public

[17] *Id.*

Knowledge Report").[18] This report was incorporated by reference in an order issued by the City of San Clemente reviewing Dimension's basic service rates[19] and was attached to the appeal of that order that Dimension filed with the Commission on October 7, 1994.[20] Based on the report, it is evident that Dimension included $33,703 of franchise fees as part of its equipment revenue in its September 6, 1994 amended Form 393, Part II, Worksheet 2, Line 204. Including franchise fees in Line 204 has the effect of increasing the operator's base rate per channel as of September 30, 1992, which may result in a higher maximum permitted rate. The Commission's rules contemplate recovery of franchise fees as an external cost in addition to the maximum permitted rates calculated on Form 393.[21] If franchise fees are both included in the base from which maximum permitted rates are calculated and permitted as an addition to maximum permitted rates, the operator will be able to recover these costs twice. For this reason, the instructions to Form 393, Worksheet II, Line 204, do not include franchise fees among the items that may be included as equipment revenue.[22] Accordingly, we remove the $33,703 of franchise fees on equipment revenues from Line 204.[23]

e. In its amended Form 393 filing, Dimension calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of October 1993 using data released by the U.S. Department of Commerce on August 31, 1993. However, Dimension failed to calculate the Inflation Adjustment Factor

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[18] The franchising authorities who received a copy of the Public Knowledge Report are: City of Dana Point; City of Laguna Hills; City of Laguna Niguel; City of Lake Forest; City of Mission Viejo; City of San Juan Capistrano; City of San Clemente; City of Laguna Beach; and Orange County.

[19] City of San Clemente Resolution No. 94-44 (Sept. 7, 1994).

[20] *See Times Mirror Cable Television of Orange County, Inc., San Clemente, California*, CUID No. CA0193, DA 94-1334, para. 7d (released Nov. 29, 1994).

[21] 47 C.F.R. § 76.923(k).

[22] Form 393 instructions for Part II, Worksheet 2, Line 204 read as follows: "[t]o calculate your monthly average equipment revenue as of September 20, 1992, take the total revenues you earned over the preceding fiscal year for the community unit for the following categories of equipment and installation services: (1) converter box rental; (2) remote control rental; (3) additional outlet fees; (4) installation fees; (5) disconnect fees; (6) reconnect fees; and (7) tier changing fees."

[23] It appears that Dimension has not included franchise fees in its equipment revenue in Part II, Worksheet 1, Line 104 of its September 6, 1994 filing. Therefore, we make no adjustments to the figure in Line 104.

to at least three decimal places, as required in the instructions to Form 393.[24] Furthermore, because of the errors discussed above Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Dimension filed.[25] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Dimension used in justifying its rates.[26]

7. Because of these errors, we conclude that Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $8.16 (as Dimension calculated in its September 6, 1994 filing) to $7.75.

8. The Public Knowledge Report also reveals that effective September 1, 1993, Dimension assessed on CPS subscribers a charge of $2.64 per month for each additional outlet. Dimension told Public Knowledge, Inc. that this charge was assessed to recover additional programming costs imposed by program suppliers to transmit CPS programming to additional outlets.[27] Under our rules, additional programming costs associated with additional outlets may be recovered as a separate monthly unbundled charge for these outlets.[28] However, Dimension failed to disclose and justify its charge as part of its rate justification before the Commission, as required by the instructions to Form 393.[29] Dimension's

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[24] FCC Form 393, page 10, para. 3.

[25] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[26] Our recalculation of the Inflation Adjustment Factor in this case differs from our recalculation in one of the other franchise areas included in the same Form 393 filing due to a difference in the date on which the first valid complaint was served on Dimension. *Cf. Times Mirror Cable Television of Orange County, Inc., San Clemente, California*, CUID No. CA0193, DA 94-1334 (released Nov. 29, 1994).

[27] Letter from Leo W. Brennan, Vice President and General Manager, Dimension Cable Services to Jay Smith, Public Knowledge, Inc. (Aug. 19, 1994). This letter is attached to the Public Knowledge Report as Exhibit 4.

[28] 47 C.F.R. § 76.923(h).

[29] FCC Form 393, page 29, note 1.

additional outlet charge falls within the jurisdiction of the Commission because it is imposed only on CPS subscribers and it allegedly relates solely and directly to the cost of programming that is transmitted on the CPS tier.[30] Because Dimension has failed to justify this charge, we will order it to refund the full amount of the charge collected from subscribers during the period covered by this Order.[31]

Conclusions

9. Upon review of the record herein, we conclude that Dimension's showing supports a maximum reasonable CPS tier price of $7.75 per month (plus franchise fee) for the period October 14, 1993 to May 14, 1994, and that Dimension has failed to justify its additional outlet charge of $2.64 per month.[32] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

10. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the October 13, 1993 complaint against the cable programming service price charged by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) in Mission Viejo, California, CUID Nos. CA0192 and CA1345, IS GRANTED TO THE EXTENT INDICATED HEREIN.

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[30] *See* 47 U.S.C. § 543(a)(2)(B). The Public Knowledge Report recommends that local franchising authorities assert jurisdiction over this charge because it is assessed on a per-outlet basis. Public Knowledge Report at 7-8. We agree with Dimension's position, as stated in its appeal of the City of San Clemente's rate order, that this charge falls within the Commission's jurisdiction. We further note the inconsistency between Dimension's position in the appeal that the Commission has jurisdiction over the additional outlet charge and its failure to attempt to justify or even to disclose that charge before the Commission.

[31] We note that Public Knowledge, Inc. similarly concluded that Dimension had failed to show that this charge represents incremental costs actually incurred by Dimension for transmitting programming to additional outlets, despite Public Knowledge Inc.'s specific request for information on this issue. Public Knowledge Report at 7.

[32] These findings are based solely on the representations of Dimension listed in paragraph 5, *supra*, and the modifications described in paragraphs 6 and 8, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

11. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of October 14, 1993 to May 14, 1994, justifies a maximum price of $7.75 per month (plus franchise fee) for Times Mirror Cable Television of Orange County, Inc.'s cable programming service tier.

12. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cablevision of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of October 14, 1993 to May 14, 1994, does not justify any separate charge for additional outlets that receive programming on the cable programming services tier.

13. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers that portion of the amounts paid for cable programming service from October 14, 1993[33] to May 14, 1994, that exceeded $7.75 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

14. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers the additional outlet charge of $2.64 per outlet per month paid by subscribers from October 14, 1993 to May 14, 1994, plus interest to the date of refund.

15. IT IS FURTHER ORDERED, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 21 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones

Meredith J. Jones
Chief, Cable Services Bureau

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[33] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1340

In the matter of	)	
	)	
Times Mirror Cable Television of	)	CUID No. CA0367
Orange County, Inc. (d/b/a Dimension	)	
Cable Services)	)	
San Juan Capistrano, California	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 28, 1994 Released: November 29, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider complaints about the price Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) ("Dimension") was charging for its cable programming service ("CPS") tier in San Juan Capistrano, California, CUID No. CA0367. Dimension has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Dimension's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Dimension has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Dimension implemented its CPS price under the new regulations. See para. 3, *infra*.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

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[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

Procedural Matters

4. The first valid CPS complaint was completed and served on Dimension on October 18, 1993.[11] The Commission received the complaint on October 25, 1993.

5. Dimension filed its first FCC Form 393s for San Juan Capistrano, California, CUID No. CA0367, on November 15, 1993.[12] On that date, the Commission received two identical filings, both dated November 9, 1993 and signed on November 10, 1993. The Commission then received two other 393 filings on March 2, 1994, which were dated and signed on February 25, 1994. The Commission received a fifth 393 filing on March 28, 1994. This filing was dated March 16, 1994 and signed on March 21, 1994. The Commission received a sixth 393 filing on May 31, 1994, which was dated November 9, 1993 and signed on May 26, 1994. Additionally, in response to two Commission letters citing still unresolved deficiencies in Dimension's showings,[13] Dimension amended its justification on August 25, 1994 and again on September 6, 1994. Dimension clarified by telephone that its August 25, 1994 and September 6, 1994 responses to Commission letters apply to all 21 CUID areas listed in "Exhibit A" to its 393 filing, including San Juan Capistrano.[14]

6. On November 15, 1993, Dimension filed a Motion to Dismiss the complaint dated October 18, 1993. In its motion, Dimension requests that the Commission dismiss the complaint on the ground that the complainant incorrectly answered question number 9 on FCC Form 329 as it then existed because he failed to identify the programming service for which the complaint was filed. Dimension's assertion does not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process

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[11] The complaint was dated October 18, 1993, and indicates that it was mailed to Dimension on that date. Dimension has not complied with 47 C.F.R. § 76.956(a) which requires it to state when service occurred. Under these circumstances we will consider October 18, 1993 as the service date.

[12] Dimension's FCC Form 393 filings include several other franchise areas that are served by the same system in addition to San Juan Capistrano. Dimension filed substantially identical justifications for all of these franchise areas as to which the Commission received complaints.

[13] Letters from John M. Spencer to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (Aug. 10, 1994 and Aug. 31, 1994).

[14] This representation was memorialized in a letter from Leora Hochstein to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (September 14, 1994), which was served on the relevant complainants and franchising authorities.

the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the rates listed in answer number 8 and on the attached bill indicate that the complainant received the CPS tier, we find it reasonable to conclude that the complainant objected to the CPS tier rate.[15] We therefore find the complaint dated October 18, 1993 valid and deny Dimension's Motion to Dismiss. (Dimension also disputes validity of subsequent complaints filed by other cable subscribers. Because we have accepted this complaint as properly filed, we find it unnecessary to rule on Dimension's objections to these later filed complaints.)

Discussion

7. Dimension asserts that its monthly CPS tier price of $8.10 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $8.16 as calculated in its most recent amended filing, dated September 6, 1994. Upon review, however, we have determined that Dimension has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Dimension's calculations in Form 393:

a. Dimension's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) reflect 25 satellite channels. Our examination of the channel line-up that Dimension provided in its August 25, 1994 filing, however, reveals only 23 satellite channels. Dimension apparently either incorrectly double-counted channels that were divided between two satellite services, or else counted channels that did not carry rate-regulated satellite programming during the majority of programming hours.

A "channel" is defined in the instructions to Form 393 as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. A channel that carries more than one programming service may nonetheless be counted as only one channel. Furthermore, under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or non rate-regulated and as either satellite or non-satellite. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. The preponderance-of-use test is the only one consistent with this conceptual framework.[16]

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[15] We note that in January 1994 the Commission released a revised Form 329 that omitted question 9.

[16] *See Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

Dimension's channel line-up for September 30, 1992, lists 20 channels that were each used for one rate-regulated satellite service the entire programming day. An additional three channels were divided between two rate-regulated satellite services: channel 43 was evenly split daily between Bravo and Mind Extension University, channel 44 was evenly split daily between CNBC and the Travel Channel, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. These channels should have been counted as only one satellite channel each, for a total of 23. In addition, Dimension lists three channels that split programming between satellite and non-satellite services: channel 3 carried 15 hours of non-satellite programming titled "Local" and 9 hours of C-Span II, channel 30 carried 17 hours of local Government Access programming and 7 hours of California Channel programming (listed as satellite), and channel 40 was evenly split between KTBN (listed as non-satellite) and VISN (listed as satellite). Because none of these channels carried satellite programming during the majority of programming hours, none should have been counted as a satellite channel. We therefore adjust the number of rate-regulated satellite channels reflected in Worksheet 2 from 25 to 23, reducing the benchmark channel rate entered on Line 220 of Worksheet 2.

b. Similarly, in its calculations in Form 393, Part II, Worksheet 1, Dimension incorrectly counted 24 satellite channels as of the initial date of regulation, even though its channel line-up for September 1, 1993 shows only 20 rate-regulated satellite channels. As in Worksheet 2, Dimension may incorrectly have double-counted either or both of two channels that were divided between two satellite services: channel 43 was split daily with 10 hours of Bravo and 14 hours of Mind Extension University, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. In addition, three channels may have been counted as satellite even though they did not carry preponderantly rate-regulated satellite-delivered programming: channels 3 and 30 were split in the same manner as in 1992, and channel 54 was evenly split between rate-regulated satellite programming (VISN) and pay-per-view programming that is not subject to rate regulation. We therefore adjust the number of rate-regulated satellite channels on the initial date of regulation from 24 to 20, thereby reducing the benchmark channel rate entered on Line 121 of Worksheet 1.

c. Dimension also incorrectly counted its rate-regulated channels as of the initial date of regulation on Form 393, Part I, and on Part II, Worksheet 1 by including channel 54 as half of a rate-regulated channel. Channel 54 carried 12 hours per day of rate-regulated satellite programming (VISN), but also carried 12 hours of pay-per-view programming that is not subject to rate regulation. As discussed above, channels must be categorized as either rate-

regulated or non rate-regulated according to their preponderance of use.[17] We therefore reduce the number of channels on the CPS tier as of the initial date of regulation from 15.5 to 15.

d. At the request of a number of Orange County franchising authorities, including the City of San Juan Capistrano, Public Knowledge, Inc., a consulting firm retained by these franchising authorities, prepared a report entitled "Review of Dimension Cable Services FCC Form 393 Cable Television Rate Filings Submitted to Several Orange County Franchising Authorities", dated August 29, 1994 ("Public Knowledge Report.")[18] This report was incorporated by reference in the City of San Juan Capistrano's order reviewing Dimension's basic service rates[19] and was attached to the appeal of that order that Dimension filed with the Commission on November 3, 1994. Based on the report, it is evident that Dimension included $33,703 of franchise fees as part of its equipment revenue in its September 6, 1994 amended Form 393, Part II, Worksheet 2, Line 204. Including franchise fees in Line 204 has the effect of increasing the operator's base rate per channel as of September 30, 1992, which may result in a higher maximum permitted rate. The Commission's rules contemplate recovery of franchise fees as an external cost in addition to the maximum permitted rates calculated on Form 393.[20] If franchise fees are both included in the base from which maximum permitted rates are calculated and permitted as an addition to maximum permitted rates, the operator will be able to recover these costs twice. For this reason, the instructions to Form 393, Worksheet II, Line 204, do not include franchise fees among the items that may be included as equipment revenue.[21] Accordingly, we remove the $33,703 of franchise fees on equipment revenues from

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[17] *Id.*

[18] The franchising authorities who received a copy of the Public Knowledge Report are: City of Dana Point; City of Laguna Hills; City of Laguna Niguel; City of Lake Forest; City of Mission Viejo; City of San Juan Capistrano; City of San Clemente; City of Laguna Beach; and Orange County.

[19] City of San Juan Capistrano Resolution No. 94-10-4-2 (Oct. 4, 1994).

[20] 47 C.F.R. § 76.923(k).

[21] Form 393 instructions for Part II, Worksheet 2, Line 204 read as follows: "[t]o calculate your monthly average equipment revenue as of September 20, 1992, take the total revenues you earned over the preceding fiscal year for the community unit for the following categories of equipment and installation services: (1) converter box rental; (2) remote control rental; (3) additional outlet fees; (4) installation fees; (5) disconnect fees; (6) reconnect fees; and (7) tier changing fees."

Line 204.[22]

e. In its amended Form 393 filing, Dimension calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of October 1993 using data released by the U.S. Department of Commerce on August 31, 1993. However, Dimension failed to calculate the Inflation Adjustment Factor to at least three decimal places, as required in the instructions to Form 393.[23] Furthermore, because of the errors discussed above Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Dimension filed.[24] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Dimension used in justifying its rates.[25]

8. Because of these errors, we conclude that Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $8.16 (as Dimension calculated in its September 6, 1994 filing) to $7.75.

9. The Public Knowledge Report also reveals that effective September 1, 1993, Dimension assessed on CPS subscribers a charge of $2.64 per month for each additional outlet. Dimension told Public Knowledge, Inc. that this charge was assessed to recover additional programming costs imposed by program suppliers to transmit CPS programming to

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[22] It appears that Dimension has not included franchise fees in its equipment revenue in Part II, Worksheet 1, Line 104 of its September 6, 1994 filing. Therefore, we make no adjustments to the figure in Line 104.

[23] FCC Form 393, page 10, para. 3.

[24] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[25] Our recalculation of the Inflation Adjustment Factor in this case differs from our recalculation in one of the other franchise areas included in the same Form 393 filing due to a difference in the date on which the first valid complaint was served on Dimension. *Cf. Times Mirror Cable Television of Orange County, Inc., San Clemente, California*, CUID No. CA0193, DA 94-1340 (released Nov. 29, 1994).

additional outlets.[26] Under our rules, additional programming costs associated with additional outlets may be recovered as a separate monthly unbundled charge for those outlets.[27] However, Dimension failed to disclose and justify its charge as part of its rate justification before the Commission, as required by the instructions to Form 393.[28] Dimension's additional outlet charge falls within the jurisdiction of the Commission because it is imposed only on CPS subscribers and it allegedly relates solely and directly to the cost of programming that is transmitted on the CPS tier.[29] Because Dimension has failed to justify this charge, we will order it to refund the full amount of the charge collected from subscribers during the period covered by this Order.[30]

Conclusions

10. Upon review of the record herein, we conclude that Dimension's showing supports a maximum reasonable CPS tier price of $7.75 per month (plus franchise fee) for the period October 25, 1993 to May 14, 1994, and that Dimension has failed to justify its additional outlet charge of $2.64 per month.[31] We further determine that we will order an

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[26] Letter from Leo W. Brennan, Vice President and General Manager, Dimension Cable Services to Jay Smith, Public Knowledge, Inc. (Aug. 19, 1994). This letter is attached to the Public Knowledge Report as Exhibit 4.

[27] 47 C.F.R. § 76.923(h).

[28] FCC Form 393, page 29, note 1.

[29] *See* 47 U.S.C. § 543(a)(2)(B). The Public Knowledge Report recommends that local franchising authorities assert jurisdiction over this charge because it is assessed on a per-outlet basis. Public Knowledge Report at 7-8. We agree with Dimension's position, as stated in its appeal of the City of San Juan Capistrano's rate order, that this charge falls within the Commission's jurisdiction. We further note the inconsistency between Dimension's position in the appeal that the Commission has jurisdiction over the additional outlet charge and its failure to attempt to justify or even to disclose that charge before the Commission.

[30] We note that Public Knowledge, Inc. similarly concluded that Dimension had failed to show that this charge represents incremental costs actually incurred by Dimension for transmitting programming to additional outlets, despite Public Knowledge Inc.'s specific request for information on this issue. Public Knowledge Report at 7.

[31] These findings are based solely on the representations of Dimension listed in paragraph 5, *supra*, and the modifications described in paragraphs 7 and 9, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to

appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the Motion of Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) to dismiss the October 18, 1993 complaint against its cable programming service price charged in San Juan Capistrano, California, CUID No. CA0367, IS DENIED.

12. IT IS FURTHER ORDERED, that the October 18, 1993 complaint against the cable programming service price charged by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) in San Juan Capistrano, California, CUID No. CA0367, and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of October 25, 1993 to May 14, 1994, justifies a maximum price of $7.75 per month (plus franchise fee) for Times Mirror Cable Television of Orange County, Inc.'s cable programming service tier.

14. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of October 25, 1993 to May 14, 1994 does not justify any separate charge for additional outlets that receive programming on the cable programming services tier.

15. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers that portion of the amounts paid for cable programming service from October 25, 1993[32] to May 14, 1994, that exceeded $7.75 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

16. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers the additional outlet charge of

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this proceeding not specifically addressed herein.

[32] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

$2.64 per outlet per month paid by subscribers from October 25, 1993 to May 14, 1994, plus interest to the date of refund.

17. IT IS FURTHER ORDERED, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 21 days of the release of this Order file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C.

DA 94-1341

In the matter of	)	
	)	
Times Mirror Cable Television of	)	CUID No. CA1085
Orange County, Inc. (d/b/a Dimension	)	
Cable Services)	)	
Laguna Hills, California	)	
	)	
Benchmark Filing To Support	)	
Cable Programming Service Price	)	

Memorandum Opinion and Order

Adopted: November 28, 1994 Released: November 29, 1994

By the Chief, Cable Services Bureau:

Introduction

1. Here we consider complaints about the price Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) ("Dimension") was charging for its cable programming service ("CPS") tier in Laguna Hills, California, CUID No. CA1085. Dimension has chosen to attempt to justify its price through a benchmark showing on FCC Form 393. This order addresses the reasonableness of Dimension's price only through May 14, 1994. At a later time we will issue a separate order addressing the reasonableness of the price after that date.[1]

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[1] The findings in this Order do not in any way prejudge the reasonableness of the price for CPS service after May 14, 1994 under our new rate regulations. However, to the extent Dimension has sought to take advantage of the refund deferral period under the *Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, MM Docket No. 92-266, FCC 94-38, 9 FCC Rcd 4119 (1994) ("*Second Order on Reconsideration*"), the maximum permitted CPS price determined herein might also apply from May 15, 1994 until the date on which Dimension implemented its CPS price under the new regulations. See para. 3, *infra*.

2. Under the Cable Television Consumer Protection and Competition Act of 1992,[2] and our rules implementing it, 47 C.F.R. Part 76, Subpart N, the Commission must review CPS prices upon the filing of a valid complaint. The filing of a valid complaint triggers an obligation on behalf of the cable operator to file a justification of its CPS prices.[3] Under our rules, an operator may attempt to justify its prices through either a benchmark showing or a cost-of-service showing.[4] In either case, the operator has the burden of demonstrating that its CPS prices are not unreasonable.[5]

3. The Commission's original rate regulations took effect on September 1, 1993.[6] The Commission subsequently revised its rate regulations effective May 15, 1994.[7] Operators with valid CPS complaints filed against them prior to May 15, 1994 must demonstrate that their CPS prices were in compliance with the Commission's initial rules from the time the complaint was filed through May 14, 1994, and that their prices were in compliance with the revised rules from May 15, 1994 forward.[8] Operators attempting to justify their prices for the period prior to May 15, 1994 through a benchmark showing must complete and file FCC Form 393.[9] Generally, to justify their prices for the period beginning May 15, 1994 through a benchmark showing, operators must use the FCC Form 1200 series.[10]

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[2] Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act"); Communications Act, § 623(c), *as amended*, 47 U.S.C. § 543(c) (1993).

[3] 47 C.F.R. § 76.956.

[4] 47 C.F.R. § 76.956(b).

[5] *Id.*

[6] *Order* in MM Docket No. 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, FCC 93-372, 58 Fed. Reg. 41042 (Aug. 2, 1993).

[7] *See Second Order on Reconsideration* at 4119; 47 C.F.R. § 76.922(b).

[8] *See Second Order on Reconsideration* at 4190, paras. 150-152.

[9] *Id.*

[10] 47 C.F.R. § 76.922(b)(6); *see also Second Order on Reconsideration* at 4189, n.195.

Procedural Matters

4. The first valid CPS complaint was completed and served on Dimension on November 4, 1993.[11] The Commission received the complaint on November 8, 1993.

5. Dimension filed its first FCC Form 393 filing for Laguna Hills, California, CUID No. CA1085, on December 6, 1993.[12] This filing was dated November 22, 1993 and signed on December 3, 1993. Additionally, in response to two Commission letters citing still unresolved deficiencies in Dimension's showings,[13] Dimension amended its justification on August 25, 1994 and again on September 6, 1994. Dimension clarified by telephone that its August 25, 1994 and September 6, 1994 responses to Commission letters apply to all 21 CUID areas listed in "Exhibit A" to its 393 filing, including Laguna Hills.[14]

6. On December 6, 1993, Dimension filed a Motion to Dismiss the complaint dated November 4, 1993. In its motion, Dimension requests that the Commission dismiss the complaint on the ground that the complainant incorrectly answered question number 9 on FCC Form 329 as it then existed because she failed to identify the programming service for which the complaint was filed. Dimension's assertion does not persuade us that the complaint is invalid or should be dismissed. In general, we will find valid any complaint that states a claim on which relief can be granted and provides adequate information to allow us to process the complaint, despite minor flaws or inaccuracies. We believe this approach best implements the mandate of the 1992 Cable Act. Because the rates listed in answer number 8 and on the attached bill indicate that the complainant received the CPS tier, we find it

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[11] The complaint was dated November 4, 1993, and states that it was mailed to Dimension on that date. Dimension has not complied with 47 C.F.R. § 76.956(a), which requires it to state when service occurred. Under these circumstances we will consider November 4, 1993 as the service date.

[12] Dimension's FCC Form 393 filings include several other franchise areas that are served by the same system in addition to Laguna Hills. Dimension filed substantially identical justifications for all of these franchise areas as to which the Commission received complaints.

[13] Letters from John M. Spencer to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (Aug. 10, 1994 and Aug. 31, 1994).

[14] This representation was memorialized in a letter from Leora Hochstein to Leo W. Brennan, Vice President and General Manager, Times Mirror Cable Television, Inc. (September 14, 1994), which was served on the relevant complainants and franchising authorities.

reasonable to conclude that the complainant objected to the CPS tier rate.[15] We therefore find the complaint dated November 4, 1993 valid and deny Dimension's Motion to Dismiss.

Discussion

7. Dimension asserts that its monthly CPS tier price of $8.10 per subscriber is justified by its benchmark filing because its price is less than the maximum permitted charge of $8.16 as calculated in its most recent amended filing, dated September 6, 1994. Upon review, however, we have determined that Dimension has not correctly calculated its maximum permitted price, and it is therefore appropriate to make the following adjustments to Dimension's calculations in Form 393:

a. Dimension's calculations for its rate-regulated package as of September 30, 1992 (Form 393, Part II, Worksheet 2) reflect 25 satellite channels. Our examination of the channel line-up that Dimension provided in its August 25, 1994 filing, however, reveals only 23 satellite channels. Dimension apparently either incorrectly double-counted channels that were divided between two satellite services, or else counted channels that did not carry rate-regulated satellite programming during the majority of programming hours.

A "channel" is defined in the instructions to Form 393 as a "unit of cable service identified and selected by a channel number or similar designation." FCC Form 393, p. 10. A channel that carries more than one programming service may nonetheless be counted as only one channel. Furthermore, under the benchmark system in effect prior to May 15, 1994, all channels must be characterized as either rate-regulated or non rate-regulated and as either satellite or non-satellite. Our policy on "split" channels is to categorize them according to their preponderance of use. This policy is based on the fact that the 1992 price survey underlying the benchmark system was analyzed based on whole, not fractional, channel counts. The preponderance-of-use test is the only one consistent with this conceptual framework. [16]

Dimension's channel line-up for September 30, 1992, lists 20 channels that were each used for one rate-regulated satellite service the entire programming day. An additional three channels were divided between two rate-regulated satellite services: channel 43 was evenly split daily between Bravo and Mind Extension University, channel 44 was evenly split daily

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[15] We note that in January 1994 the Commission released a revised Form 329 that omitted question 9.

[16] *See Viacom Cable, Nashville, Tennessee*, CUID No. TN0148, DA 94-1151, para. 6a-6c (released Nov. 9, 1994).

between CNBC and the Travel Channel, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. These channels should have been counted as only one satellite channel each, for a total of 23. In addition, Dimension lists three channels that split programming between satellite and non-satellite services: channel 3 carried 15 hours of non-satellite programming titled "Local" and 9 hours of C-Span II, channel 30 carried 17 hours of local Government Access programming and 7 hours of California Channel programming (listed as satellite), and channel 40 was evenly split between KTBN (listed as non-satellite) and VISN (listed as satellite). Because none of these channels carried satellite programming during the majority of programming hours, none should have been counted as a satellite channel. We therefore adjust the number of rate-regulated satellite channels reflected in Worksheet 2 from 25 to 23, reducing the benchmark channel rate entered on Line 220 of Worksheet 2.

b. Similarly, in its calculations in Form 393, Part II, Worksheet 1, Dimension incorrectly counted 24 satellite channels as of the initial date of regulation, even though its channel line-up for September 1, 1993 shows only 20 rate-regulated satellite channels. As in Worksheet 2, Dimension may incorrectly have double-counted either or both of two channels that were divided between two satellite services: channel 43 was split daily with 10 hours of Bravo and 14 hours of Mind Extension University, and channel 48 was evenly split each day between Prime Ticket and The Learning Channel. In addition, three channels may have been counted as satellite even though they did not carry preponderantly rate-regulated satellite-delivered programming: channels 3 and 30 were split in the same manner as in 1992, and channel 54 was evenly split between rate-regulated satellite programming (VISN) and pay-per-view programming that is not subject to rate regulation. We therefore adjust the number of rate-regulated satellite channels on the initial date of regulation from 24 to 20, thereby reducing the benchmark channel rate entered on Line 121 of Worksheet 1.

c. Dimension also incorrectly counted its rate-regulated channels as of the initial date of regulation on Form 393, Part I, and on Part II, Worksheet 1 by including channel 54 as half of a rate-regulated channel. Channel 54 carried 12 hours per day of rate-regulated satellite programming (VISN), but also carried 12 hours of pay-per-view programming that is not subject to rate regulation. As discussed above, channels must be categorized as either rate-regulated or non rate-regulated according to their preponderance of use.[17] We therefore reduce the number of channels on the CPS tier as of the initial date of regulation from 15.5 to 15.

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[17] *Id.*

d. At the request of a number of Orange County franchising authorities, including the City of Laguna Hills, Public Knowledge, Inc., a consulting firm retained by these franchising authorities, prepared a report entitled "Review of Dimension Cable Services FCC Form 393 Cable Television Rate Filings Submitted to Several Orange County Franchising Authorities", dated August 29, 1994 ("Public Knowledge Report").[18] This report was incorporated by reference in the City of Laguna Hills' order reviewing Dimension's basic service rates[19] and was attached to the appeal of that order that Dimension filed with the Commission on October 13, 1994. Based on the report, it is evident that Dimension included $33,703 of franchise fees as part of its equipment revenue in its September 6, 1994 amended Form 393, Part II, Worksheet 2, Line 204. Including franchise fees in Line 204 has the effect of increasing the operator's base rate per channel as of September 30, 1992, which may result in a higher maximum permitted rate. The Commission's rules contemplate recovery of franchise fees as an external cost in addition to the maximum permitted rates calculated on Form 393.[20] If franchise fees are both included in the base from which maximum permitted rates are calculated and permitted as an addition to maximum permitted rates, the operator will be able to recover these costs twice. For this reason, the instructions to Form 393, Worksheet II, Line 204, do not include franchise fees among the items that may be included as equipment revenue.[21] Accordingly, we remove the $33,703 of franchise fees on equipment revenues from Line 204.[22]

e. In its amended Form 393 filing, Dimension calculated the Inflation Adjustment Factor (line 127, Worksheet 1, Part II) as of the end of October 1993

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[18] The franchising authorities who received a copy of the report prepared by Public Knowledge, Inc. are: City of Dana Point; City of Laguna Hills; City of Laguna Niguel; City of Lake Forest; City of Mission Viejo; City of San Juan Capistrano; City of San Clemente; City of Laguna Beach; and Orange County.

[19] City of Laguna Hills Resolution No. 94-09-13-4 (Sept. 13, 1994).

[20] 47 C.F.R. § 76.923(k).

[21] Form 393 instructions for Part II, Worksheet 2, Line 204 read as follows: "[t]o calculate your monthly average equipment revenue as of September 20, 1992, take the total revenues you earned over the preceding fiscal year for the community unit for the following categories of equipment and installation services: (1) converter box rental; (2) remote control rental; (3) additional outlet fees; (4) installation fees; (5) disconnect fees; (6) reconnect fees; and (7) tier changing fees."

[22] It appears that Dimension has not included franchise fees in its equipment revenue in Part II, Worksheet 1, Line 104 of its September 6, 1994 filing. Therefore, we make no adjustments to the figure in Line 104.

using data released by the U.S. Department of Commerce on August 31, 1993. However, Dimension failed to calculate the Inflation Adjustment Factor to at least three decimal places, as required in the instructions to Form 393.[23] Furthermore, because of the errors discussed above Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We must therefore recalculate the Inflation Adjustment Factor on the basis of the most accurate data currently available for the date as of which Dimension filed.[24] On July 29, 1994, the Department of Commerce released corrected inflation data including Gross National Product Price Index ("GNP-PI") figures of 122.3 for the third quarter of 1992 and 125.7 for the third quarter of 1993. Using these GNP-PI figures, we calculate 1.030 as the Inflation Adjustment Factor through October 1993, the base date Dimension used in justifying its rates.[25]

8. Because of these errors, we conclude that Dimension has failed to demonstrate that its price for the CPS tier was not unreasonable. We will therefore set a price for this tier, incorporating the adjustments discussed above. These adjustments have the cumulative effect of reducing the maximum permitted monthly CPS tier price from $8.16 (as Dimension calculated in its September 6, 1994 filing) to $7.75.

9. The Public Knowledge Report also reveals that effective September 1, 1993, Dimension assessed on CPS subscribers a charge of $2.64 per month for each additional outlet. Dimension told Public Knowledge, Inc. that this charge was assessed to recover additional programming costs imposed by program suppliers to transmit CPS programming to additional outlets.[26] Under our rules, additional programming costs associated with additional outlets may be recovered as a separate monthly unbundled charge for those outlets.[27] However, Dimension failed to disclose and justify its charge as part of its rate justification

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[23] FCC Form 393, page 10, para. 3.

[24] *See* 47 C.F.R. § 76.922(b)(9)(iii) (if a cable operator fails to justify its rates, rates must be adjusted in accordance with the most accurate data available at the time of analysis).

[25] Our recalculation of the Inflation Adjustment Factor in this case differs from our recalculation in one of the other franchise areas included in the same Form 393 filing due to a difference in the date on which the first valid complaint was served on Dimension. *Cf. Times Mirror Cable Television of Orange County, Inc., San Clemente, California*, CUID No. CA0193, DA 94-1334 (released Nov. 29, 1994).

[26] Letter from Leo W. Brennan, Vice President and General Manager, Dimension Cable Services to Jay Smith, Public Knowledge, Inc. (Aug. 19, 1994). This letter is attached to the Public Knowledge Report as Exhibit 4.

[27] 47 C.F.R. § 76.923(h).

before the Commission, as required by the instructions to Form 393.[28] Dimension's additional outlet charge falls within the jurisdiction of the Commission because it is imposed only on CPS subscribers and it allegedly relates solely and directly to the cost of programming that is transmitted on the CPS tier.[29] Because Dimension has failed to justify this charge, we will order it to refund the full amount of the charge collected from subscribers during the period covered by this Order.[30]

Conclusions

10. Upon review of the record herein, we conclude that Dimension's showing supports a maximum reasonable CPS tier price of $7.75 per month (plus franchise fee) for the period November 8, 1993 to May 14, 1994, and that Dimension has failed to justify its additional outlet charge of $2.64 per month.[31] We further determine that we will order an appropriate refund pursuant to Section 76.957 of the Commission's Rules, 47 C.F.R. § 76.957, in order to reimburse subscribers for the amount they paid in excess of a reasonable price.

11. Accordingly, IT IS ORDERED, pursuant to Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321, that the Motion of Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) to dismiss the November 4, 1993 complaint against its cable programming service price charged in Laguna Hills, California, CUID No.

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[28] FCC Form 393, page 29, note 1.

[29] *See* 47 U.S.C. § 543(a)(2)(B). The Public Knowledge Report recommends that local franchising authorities assert jurisdiction over this charge because it is assessed on a per-outlet basis. Public Knowledge Report at 7-8. We agree with Dimension's position, as stated in its appeal of the City of Laguna Hills' rate order, that this charge falls within the Commission's jurisdiction. We further note the inconsistency between Dimension's position in the appeal that the Commission has jurisdiction over the additional outlet charge and its failure to attempt to justify or even to disclose that charge before the Commission.

[30] We note that Public Knowledge, Inc. similarly concluded that Dimension had failed to show that this charge represents incremental costs actually incurred by Dimension for transmitting programming to additional outlets, despite Public Knowledge Inc.'s specific request for information on this issue. Public Knowledge Report at 7.

[31] These findings are based solely on the representations of Dimension listed in paragraph 5, *supra*, and the modifications described in paragraphs 7 and 9, *supra*. Should information come to our attention that these representations (including representations as to data regarding installations and customer equipment) were materially inaccurate, we reserve the right to take appropriate action. This Order is not to be construed as a finding that we have accepted as correct any specific entry, explanation or argument made by any party to this proceeding not specifically addressed herein.

CA1085, IS DENIED.

12. IT IS FURTHER ORDERED, that the November 4, 1993 complaint against the cable programming service price charged by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) in Laguna Hills, California, CUID No. CA1085, and all other complaints relating to the same price, ARE GRANTED TO THE EXTENT INDICATED HEREIN.

13. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of November 8, 1993 to May 14, 1994, justifies a maximum price of $7.75 per month (plus franchise fee) for Times Mirror Cable Television of Orange County, Inc.'s cable programming service tier.

14. IT IS FURTHER ORDERED, that the benchmark filing submitted by Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) for the period of November 8, 1993 to May 14, 1994, does not justify any separate charge for additional outlets that receive programming on the cable programming services tier.

15. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers that portion of the amounts paid for cable programming service from November 8, 1993[32] to May 14, 1994, that exceeded $7.75 (plus franchise fee) per month and was thus unreasonable, plus interest to the date of the refund.

16. IT IS FURTHER ORDERED, pursuant to Section 76.961 of the Commission's Rules, 47 C.F.R. § 76.961, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall refund to subscribers the additional outlet charge of $2.64 per outlet per month paid by subscribers from November 8, 1993 to May 14, 1994, plus interest to the date of refund.

17. IT IS FURTHER ORDERED, that Times Mirror Cable Television of Orange County, Inc. (d/b/a Dimension Cable Services) shall promptly determine the overcharges to CPS subscribers for the stated period, and shall within 21 days of the release of this Order

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[32] Our jurisdiction to order a refund dates from the earliest date a valid complaint is filed with the Commission. 47 C.F.R. § 76.961(b).

file a report with the Chief, Cable Services Bureau, stating the cumulative refund amount so determined (including franchise fees and interest), describing the calculation thereof, and describing its plan to implement the refund within 30 days of Commission approval thereof.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau